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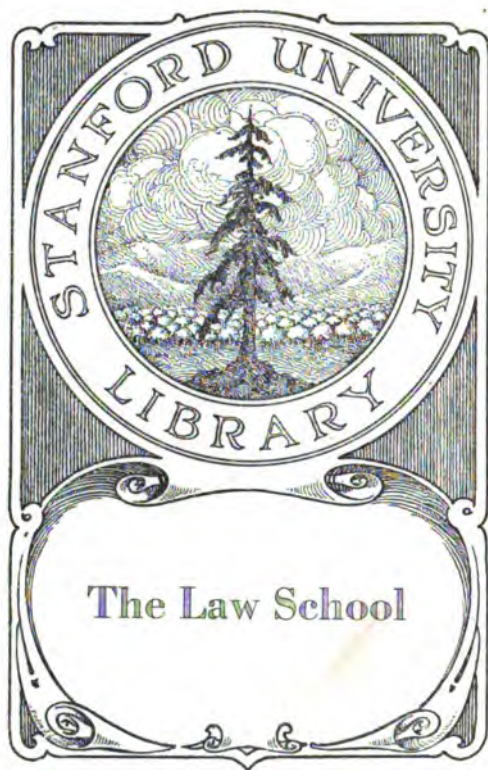
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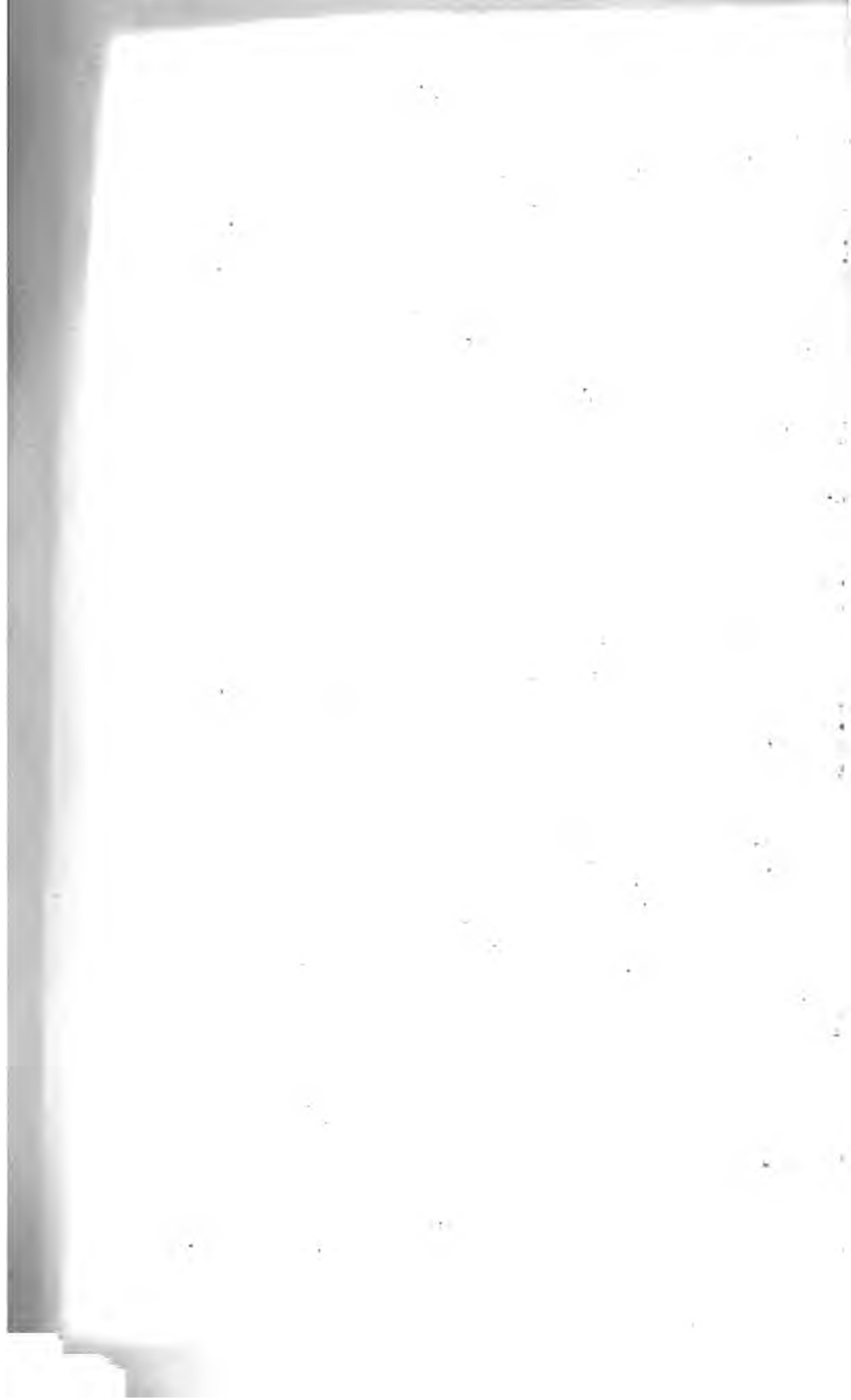
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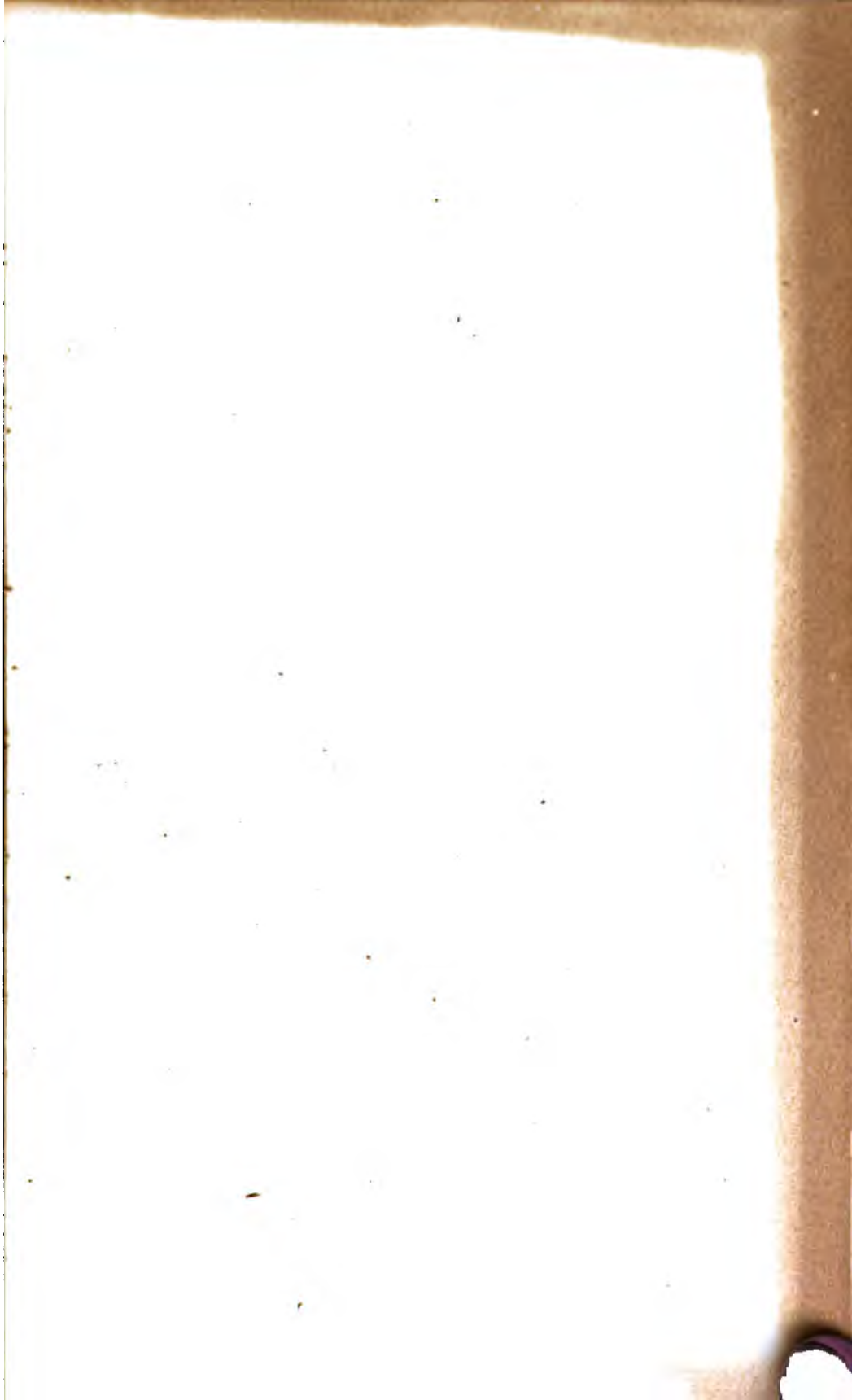
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REPORTS
OF
CASES DECIDED
BY THE
ENGLISH COURTS,
WITH
NOTES AND REFERENCES TO KINDRED CASES
AND AUTHORITIES.

BY
NATHANIEL C. MOAK,
Counsellor at Law.

VOLUME XXXIII.

CONTAINING

4 APPEAL CASES, pp. 1-843.

5 APPEAL CASES, pp. 1-623.

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JUDGES.

LORD HIGH CHANCELLOR.

Right Hon. LORD CAIRNS,¹ appointed 1874.

Right Hon. LORD SELBORNE,² " 1880.

LORDS OF APPEAL IN ORDINARY.

Right Hon. LORD BLACKBURN, appointed 1876.

Right Hon. LORD GORDON,³ " "

Right Hon. WILLIAM WATSON,⁴ " 1880.

PRIVY COUNCIL, JUDICIAL COMMITTEE.

(APPOINTED UNDER 34 & 35 VICT., CH. 91: USUALLY SITTING.)

Right Hon. Sir JAMES W. COLVILLE.⁵

Right Hon. Sir BARNES PEACOCK.

Right Hon. Sir MONTAGUE E. SMITH.⁶

Right Hon. Sir ROBERT P. COLLIER.

Right Hon. Sir RICHARD COUCH.⁷

1 Retired with Earl of Beaconsfield's administration, April, 1880: 15 L. J., 227.

2 Appointed under Gladstone's administration, April, 1880: 15 L. J., 227.

3 Died August 21, 1879: 15 L. J., 115.

4 Appointed to fill vacancy of Lord Gordon, April, 1880: 15 L. J., 115, 234.

5 Died December 7, 1880: 15 L. J., 595, 602.

6 Resigned December 21, 1881: 16 L. J., 607, 622; 72 L. T., 163.

7 Appointed January 26, 1881, in place of Sir JAMES W. COLVILLE: 16 L. J., 49, 58.

X

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Ex officio Members.

The Right Hon. the LORD HIGH CHANCELLOR (President).
 The Right Hon. the LORD CHIEF JUSTICE of England.
 The Right Hon. the MASTER OF THE ROLLS.
 The Right Hon. the LORD CHIEF JUSTICE of the Common Pleas.
 The Right Hon. the LORD CHIEF BARON of the Exchequer.

Ordinary Members.

Right Hon. Sir WILLIAM MILBOURNE JAMES, ¹	appointed 1870.
Right Hon. Sir GEORGE MELLISH, ²	" "
Right Hon. Sir RICHARD BAGGALLAY,	" 1875.
Right Hon. Sir GEORGE WM. W. BRAMWELL, ³	" 1876.
Right Hon. Sir WILLIAM BALIOL BRETT, ⁴	" "
Right Hon. Sir RICHARD PAUL AMPHLETT, ⁵	" "
Right Hon. Sir HENRY COTTON, ⁶	" 1877.
Right Hon. Sir ALFRED HENRY THESIGER, ⁷	" "
Right Hon. Sir GEORGE JESSEL, ⁸	" 1881.
Right Hon. Sir NATHANIEL LINDLEY, ⁹	" "
Right Hon. Sir JOHN HOLKER, ¹⁰	" 1882.
Right Hon. Sir CHARLES SYNGE CHRISTOPHER BOWEN, ¹¹	" "
Right Hon. Sir JOHN DAVID FITZGERALD, ¹²	" "
Right Hon. Sir EDWARD FRY, ¹³	" 1883.

1 Died June 7, 1881: 16 Law Jour., 258; 71 Law Times, 105.

2 Died June 16, 1877: 12 Law Jour., 372.

3 Retired September 1, 1881: 71 L. T., 333; 16 L. J., 411.

4 Appointed Master of the Rolls, April 5, 1883: 18 L. J., 183, 203.

5 Retired on account of ill health, October, 1877: 63 L. T., 417. Died January 7, 1884. 76 L. T., 123; 18 L. J., 687.

6 Appointed June, 1877, in place of Lord Justice MELLISH: 12 Law Jour., 386.

7 Appointed November, 1877, in place of Lord Justice AMPHLETT: 12 L. J., 631. Died October 20, 1880: 15 L. J., 507, 508, 518, 527; 69 L. T., 419, 433.

8 Promoted to Court of Appeal, September 10, 1881: 16 L. J., 397. Died March 21, 1883: 74 L. T., 375, 390.

9 Promoted from Court of Common Pleas, October 29, 1881: 71 L. T., 409. Sworn in November 1, 1881: 72 L. T., 12.

10 Died May 24, 1882: 17 L. J., 275; 73 L. T., 71.

11 Appointed from Queen's Bench to Court of Appeal, in place of Sir JOHN HOLKER, June 1, 1882: 73 L. T., 87; 17 L. J., 289.

12 Appointed June 5, 1882: 73 L. T., 104; 18 L. J., 318.

13 Appointed to Court of Appeal, from Chancery Division, April 5, 1883: 18 L. J., 183, 203; 74 L. T., 401; 18 L. J., 215, 239.

NAMES OF THE JUDGES.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Right Hon. the LORD HIGH CHANCELLOR (President).

Right Hon. Sir GEORGE JESSEL, ¹	Master of the Rolls, appointed 1873.			
Right Hon. Sir WILLIAM BALIOL BRETT, ²		"		1883.
Hon. Sir RICHARD MALINS, ³	Vice-Chancellor,	"		1866.
Hon. Sir JAMES BACON,	" "	"		1870.
Hon. Sir CHARLES HALL, ⁴	" "	"		1873.
Hon. Sir EDWARD E. KAY, ⁵	" "	"		1881.
Hon. Sir EDWARD FRY, ⁶	Justice of the High Court,	"		1877.
Hon. Sir JOSEPH W. CHITTY, ⁷	" " "	"		1881.
Hon. Sir JOHN PEARSON, ⁸	" " "	"		1882.
Hon. Sir FORD NORTH, ⁹	" " "	"		1881.

¹ Promoted to Court of Appeal, September 10, 1881: 16 L. J., 397. Died March 21, 1883: 74 L. T., 375, 390; 18 L. J., 159, 166, 180.

² Appointed Master of the Rolls, from Court of Appeal, April 5, 1883: 10 L. J., 183, 208.

³ Retired March 19, 1881: 16 L. J., 137, 146.

⁴ Resigned October 13, 1882: 17 L. J., 541.

⁵ Appointed March 30, 1881: 16 L. J., 147.

⁶ Appointed April 30, 1877, under the act of April 24, 1877: 12 Law Jour., 251.

⁷ Appointed September 6, 1881: 71 L. T., 321, 328; 16 L. J., 397.

⁸ Appointed and sworn in, October 24, 1882: 17 L. J., 541, 556.

⁹ Appointed in place of Mr. Justice LINDLEY. Sworn in November 1, 1881: 72 L. T., 1, 12. Promoted to Chancery Division, April 10, 1883: 18 L. J., 205, 215.

QUEEN'S BENCH DIVISION.

Right Hon. Sir ALEXANDER JAMES EDMUND COCKBURN,¹ Bart., G.C.B.,
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Hon. Sir HENRY MANISTY,	" 1876.
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Hon. Sir JOHN HOLKER, ⁷	" 1882.
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Hon. Sir ARCHIBALD LEVIN SMITH, ⁹	" 1883.

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Hon. Sir NATHANIEL LINDLEY, ¹¹	" 1875.
Hon. Sir HENRY CHARLES LOPES,	" 1876.
Hon. Sir J. C. MATHEW, ¹²	" 1881.
Hon. Sir HENRY MATHER JACKSON, ¹³	" "
Hon. Sir LEWIS W. CAVE, ¹⁴	" "

1 Died November 20, 1880: 15 L. J., 576, 589; 15 Am. L. Rev., 134.

2 Appointed to fill vacancy occasioned by death of Lord Cockburn.

3 Resigned June 11, 1879: 14 Law Jour., 366; 67 Law Times, 127.

4 Died December 27, 1881: 72 L. T., 145, 173; 16 L. J., 624; 17 L. J., 6.

5 Appointed June 11, 1879: 14 Law Jour., 366; 67 Law Times, 127—transferred to Court of Appeal, June 1, 1882.

6 Appointed in place of Mr. Justice LINDLEY. Sworn in November 1, 1881: 72 L. T., 1, 12.

Promoted to Chancery Division, April 10, 1883: 18 L. J., 205, 215.

7 Appointed January 10, 1882: 17 L. J., 15, 33; 72 L. T., 181. Died May 24, 1882: 17 L. J., 275; 73 L. T., 71; 73 L. T., 87; 17 L. J., 289.

8 Appointed June 6, 1882: 18 L. J., 319; 73 L. T., 91.

9 Appointed April 10, 1883, in place of Mr. Justice NORTH, promoted to Chancery Division: 18 L. J., 205, 215, 239.

10 Appointed to fill vacancy occasioned by death of Lord Cockburn.

11 Promoted to Court of Appeal, October 29, 1881: 71 L. T., 409.

12 Appointed March 1, 1881: 16 Law Jour., 103.

13 Appointed March 1, 1881: 16 L. J., 103. Died March 12, 1881: 16 L. J., 113.

14 Appointed March 26, 1881, to fill vacancy occasioned by death of Mr. Justice JACKSON: 16 Law Journal, 123.

EXCHEQUER DIVISION.

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Hon. Sir JOHN WALTER HUDDLESTON,	" 1875.
Hon. Sir HENRY HAWKINS,	" 1876.
Hon. Sir JAMES FITZ-JAMES STEPHEN, ³	" 1879.

COURT OF APPEAL IN BANKRUPTCY.

The Ordinary Judges of the Court of Appeal.

PROBATE, MATRIMONIAL, DIVORCE, AND ADMIRALTY DIVISION.

Right Hon. Sir JAMES HANNEN (President),	appointed 1872.
Right Hon. Sir ROBERT J. PHILLIMORE, ⁴	" 1876.
Right Hon. Sir CHARLES PARKER BUTT, ⁵	" 1883.

CHIEF JUDGE IN BANKRUPTCY.

Hon. Sir JAMES BACON, Vice-Chancellor.

JUDGE OF THE COURT OF ARCHES.

LORD PENZANCE, appointed 1875.

¹ Died September 18, 1880: 15 Law Jour., 459; 66 Law Times, 359, 367.

² Resigned January, 1879: 14 Law Jour., 15; 66 Law Times, 191.

³ Appointed January, 1879, in place of Baron LEASBY: 14 L. Jour., 34; 66 Law Times, 191.

⁴ Retired March 21, 1883: 74 L. T., 383.

⁵ Appointed March 26, 1883: 74 L. T., 383; 18 L. J., 169, 181, 239.

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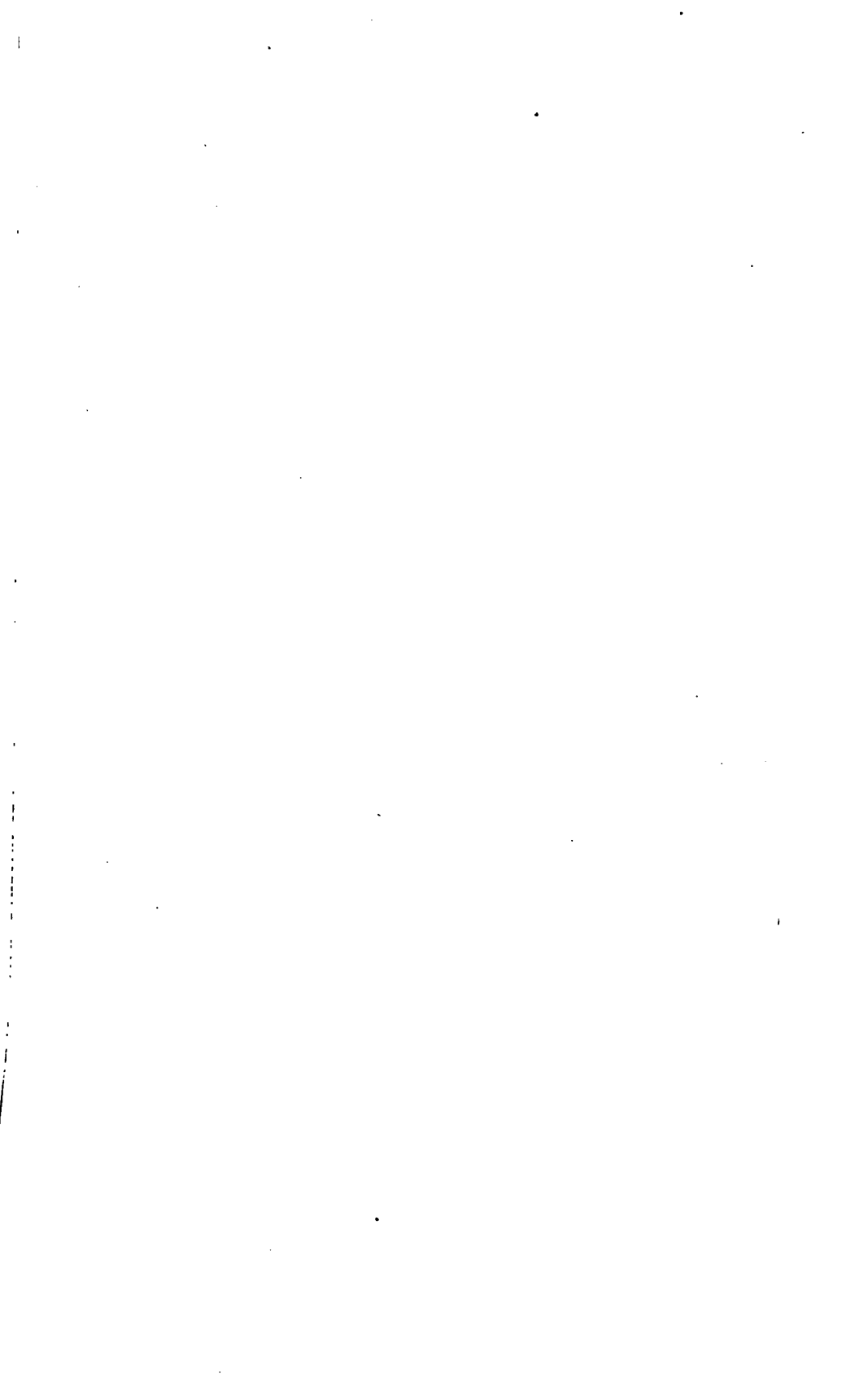
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APPEAL CASES
BEFORE THE
HOUSE OF LORDS
(ENGLISH, IRISH, AND SCOTCH)
AND THE
JUDICIAL COMMITTEE
OF
HER MAJESTY'S MOST HONORABLE
PRIVY COUNCIL.

[4 Appeal Cases, 1.]

H.L. (E.), November 14, 1878.

[HOUSE OF LORDS.]

*JOSEPH FISHER, *Appellant*; and WILLIAM DIGBY [1
SMITH, *Respondent*.

Policy on Ship—Broker's Lien on.

The lien of a broker upon policies of insurance which he has effected, and on which he has paid the premiums, may be superseded by a special arrangement or contract, or by his particular mode of dealing with the parties for whom he has effected them. But where he has merely agreed to state monthly accounts and to receive monthly payments, but has never delivered up the policies until after actual payment made to him, his general right of lien is not superseded in any way by this special arrangement. And this is so though he has effected the policies through an intermediary, whom he knew to be an intermediary and not the principal, and who has received payment from the principal, but who has not paid the broker.

In this case the Court of Appeal had reversed a previous judgment of the Exchequer.

Mr. Fisher was a shipowner and merchant at Barrow-in-Furness. There was no insurance broker or underwriter there. Mr. Smith *was an insurance broker carrying [2 on business at Liverpool in connection with a Mr. Brand.

1878

Fisher v. Smith.

H.L. (E.)

Messrs. Skinner & Co. of Barrow-in-Furness were generally employed by Fisher to get insurances effected for him on his vessels, and Skinner & Co. employed for that purpose either the present respondent, Mr. Smith, or Mr. Brand, and it was known to Fisher that one or other of them was so employed to effect policies for him. In July, 1874, Fisher instructed Skinner & Co. to get insurances effected for him, altogether amounting to £4,000, on a cargo of steel per ship Eliza S. Milligan, from Barrow-in-Furness to New Brunswick. The insurances appeared in this instance to have been effected through Smith, who always retained the policies till the premiums and brokerage on them had been paid to him. The usual course of business between Fisher and Skinner & Co. was this. The latter, on the 8th day of each month, made out an account with the sums due and payable by him to them, in respect of premiums, brokerage, and other charges due in relation to policies of insurance, effected by them for him in the course of the preceding month, and these accounts were settled by Fisher's acceptances at one month, which had been always duly paid. The account for July, 1874, was in this way delivered in August. The account for August would not be delivered till the early part of September, and it was then delivered, adjusted, and settled in the usual manner. This account included the insurance on the cargo by the Eliza S. Milligan. An average loss accrued in respect of the cargo of that vessel, and Mr. Fisher, after the 13th of August, 1874, applied to Skinner & Co. for his policies. Smith did know, throughout, that Fisher was the principal for whom the policies were effected. Skinner & Co. could not comply with the demand of Fisher, for the policies were then in the hands of Smith, who retained possession of them to satisfy his claim of lien in respect of premiums paid by him on these policies, and which had not been repaid to him by Skinner & Co. Fisher, who, till then, knew nothing of the arrangements between Smith and Skinner & Co., denied the right of Smith to retain the policy in respect of claims which Smith had against Skinner & Co., and brought an action of *detinue*. The defendant pleaded, first, denying the detainer; secondly, denying the plaintiff's property in the policy; thirdly, claiming a lien on policies [3] for *premiums paid by him for the plaintiff and at his request, which premiums remained unpaid by the plaintiff to the defendant during the said detention; and fourthly, a general lien for money due from the plaintiff to the defendant as an insurance broker for effecting the same and other

policies, and for money paid, &c. The plaintiff replied taking issue on these pleas.

The cause came on for trial before Mr. Justice Archibald at the Spring Assizes at Gloucester in 1875, when it was referred to a barrister to state a special case for the opinion of the court, with liberty reserved to the judges to draw any inferences of fact that might be drawn by a jury.

The case set forth the facts above stated, and, in the Exchequer, judgment was given for the plaintiff. The Court of Appeal reversed that judgment and this appeal was then brought.

Mr. *Watkin Williams*, Q.C., and Mr. *Pritchard*, for the appellant: It might be admitted as a general rule that for money and labor expended on the production of an article, the person who expended them had a lien on the article itself; but that rule was in its application subject to certain qualifications. A lien is not to be assumed in this case, for the two parties did not deal with each other, and the question between the appellant and respondent is not the same as it might have been between the respondent and Skinner & Co. But assuming the respondent to have a general right of lien on the policies he has effected, yet here the course of dealing which established a particular time and mode of payment really put an end to that general right of lien on Smith's part. In *Crawshay v. Homfray* ⁽¹⁾, wharfage dues were, by the course of dealing between the parties, paid by the importer of the goods at the Christmas following the importation, whether the goods were or were not in the meantime removed. They might be in the meantime removed by the importer. Certain goods were sold to A.—the importer after Christmas became bankrupt—and it was held that no lien for wharfage dues could be enforced against A. That decision was founded on *Chase v. Westmore* ⁽²⁾, where, though a general right of lien on the part of a workman *was admitted, it was said that, if the parties contracted for a particular mode of payment, the workman has no right to set up a claim inconsistent with that contract. *How v. Kirchner* ⁽³⁾ distinctly declared that though there was a general lien, yet, if there was a contract inconsistent with it, that lien could not be enforced. And *Kirchner v. Venus* ⁽⁴⁾ affirmed the same rule. The principle that where a broker knows his immediate employer to be an agent he cannot enforce against the principal a lien in order to secure payment

⁽¹⁾ 4 B. & A., 50.

⁽²⁾ 5 M. & S., 180.

⁽³⁾ 11 Moo. P. C., 21.

⁽⁴⁾ 12 Moo. P. C., 361; see also *Bock v. Gorriassen*, 2 D. F. & J., 484.

of what is due to him from the agent, was fully explained in *Westwood v. Bell* ⁽¹⁾, which had been acted on ever since and where the essential question was stated to be the knowledge of the broker that he was dealing with a principal or an agent. Here he knew that he was dealing with an agent. The moment the policy was made it became the property of Fisher, and could not be affected by the indebtedness of Skinner to Smith. The right of a broker to a lien is asserted in *Arnould on Insurance* ⁽²⁾, but it is there distinctly stated that that does not extend to the case where the broker knows that the policy is not effected for the person by whom he is immediately employed. *Kirchner v. Venus* ⁽³⁾ expressly recognized that principle, and declared that, in the case of freight itself, the general right might be affected by the special circumstances of the dealings between the parties.

There was no debt due from the appellant himself on account of the policy, and the respondent could not claim a lien against the appellant's property in respect of a debt due to the respondent from a third person to whom he had given credit. So far as the appellant was concerned the respondent's claims had been satisfied by the payment to Skinner & Co.

Mr. *H. Matthews*, Q.C., and Mr. *MacLachlan*, for the respondent, were not called on.

THE LORD CHANCELLOR (Earl Cairns): My Lords, I do not think that your Lordships entertain any doubt as to the propriety of the decision of the Court of Appeal in this case.

5] *There are here substantially three questions in the case which have been argued by the learned counsel for the appellant. In the first place, was there in the respondent, from the nature of the transactions, a lien? Secondly, was that lien superseded by any contract or course of business inconsistent with it? And thirdly, was it discharged by any payment which was a payment to the respondent?

Now, my Lords, as to the question whether this is a case in which lien originally would arise in the respondent, I think there can be no doubt. He is the person who effected the policies of insurance, he either paid the premiums or became liable for the premiums, and his was the labor and the care through which the insurances were effected. According to the well-known rule of law he would be entitled, by common law, for his labor and care and his money expended, to a lien, in the nature of holding possession of the

⁽¹⁾ 4 Camp., 349.

⁽²⁾ Page 139 *et seq.*

⁽³⁾ 12 Moo. P. C., 361; see also *Bock v. Gorrisen*, 2 D. F. & J., 434.

policies, and he would be entitled to that lien against every person,—against the owner of the goods for whose benefit the policies were effected, and against any intermediaries who might have intervened between the owner of the goods and himself. That appears to me to be the ordinary and well-known rule of law, and I do not think it was seriously disputed at your Lordships' bar.

But, my Lords, was there any contract or course of dealing in the case superseding that lien which, ordinarily speaking, would have arisen? As to that, the argument has assumed the shape of an argument that the lien was superseded, whether it was a lien of the respondent or of the intermediary, Skinner; but I will take it as a lien of the respondent. The course of dealing is a question of fact, and is to be ascertained from the statements in the case, with the power which your Lordships have, and which the court below had, to draw whatever may be the inferences of fact that you think a jury would or ought to have drawn. The course of dealing was this: The respondent, Smith, effected in the course of the month a number of insurances for Skinner & Co.; at the end of the month, or within the first ten days of the succeeding month, he furnished Skinner & Co. with an account of all that he had expended, and of his commission, and he expected to receive payment in cash on the 10th of the following month for *what he had so [6 expended. It is said that that was a giving of credit, and that it was inconsistent with maintaining a lien, and that it superseded any right of lien which might otherwise have existed.

My Lords, I could quite understand a course of business of that kind, with a slight addition, superseding the lien. A case of *Crawshay v. Homfray* ⁽¹⁾ was cited, in which there was an additional element in the course of business. There a wharfinger was in the habit of receiving goods upon which he might have had a lien, but the course of business was that he parted with the goods from time to time, receiving payment at the end of every six months, or at the end of every year, for all his dues; and it was held that that course of business prevented him from maintaining his right of lien. If it had been the course of business here for the respondent not merely to effect these policies, but from time to time to give them up as they were effected, and simply to stand upon his right to be paid at the end of the month, then I can understand that the case ought to be likened to the case to which reference was made.

(1) 4 B. & A., 50.

But instead of that being so here, your Lordships have exactly the opposite state of facts found in this case, because not only is there no statement that it was the habit for the policies to be delivered up at the end of the month, and not only is the case one in which you are dealing with a kind of article, namely, policies of insurance, as to which there is no immediate necessity for delivering them up as soon as they are effected, but, in addition to that, you have a precise statement, inserted apparently for this very purpose, that it was not the usual practice for the defendant or his partner to part with the original stamped policies to Skinner & Co., until the premiums were received from them. What does that mean but this, that the habit of business between the parties was that the respondent insisted upon and held firm by his lien? And no instance can be given of an opposite kind. My Lords, the conclusion of course, as a matter of fact, upon that is, that the course of business was not any superseding of the lien, but was a course of business by which the premiums were settled month by month, the lien notwithstanding being maintained until payment. That, my Lords, answers the second question.

7] *Then is there anything which has discharged the lien by payment? The moment your Lordships find that the lien was a lien of the respondent, there is no pretence for saying that there was any payment to him, because such payment as has been made was payment to Skinner & Co., the intermediary, and the learned counsel for the appellant very properly said that he could not contend that Skinner & Co. were the agents of the respondent to receive payment.

My Lords, that exhausts the whole of the case, and under these circumstances I submit to your Lordships that the appeal must be dismissed with costs.

LORD PENZANCE: My Lords, I have listened with great attention to the argument which has been urged upon the part of the appellant, and I confess I have been quite unable, throughout that argument, to appreciate the existence of any considerable difficulty in this case.

The plaintiff, Mr. Fisher, lived at a place called Barrow-in-Furness, which is at some distance from Liverpool, and he was minded to open a policy of insurance upon some goods belonging to him. He employed a local agent at Barrow-in-Furness named Skinner to effect that policy, and Skinner obviously would have to communicate with Liverpool in order to do it. Skinner might have addressed himself to some Liverpool underwriter; but I apprehend that, although, as appears in this case that might be done, a much

more convenient method of carrying out Fisher's purpose was to employ some broker in Liverpool who would be able to make terms on the spot for a satisfactory premium. Accordingly Skinner employed the defendant as a sub-agent of Mr. Fisher, the owner of the goods, and employed him to effect the policy. Thereupon the defendant effected a policy and kept it in his hands, as I believe is the universal practice of brokers effecting insurances.

The result of that transaction, as it seems to me, would be to make Mr. Smith, the defendant, the sub-agent of Mr. Fisher. Mr. Fisher knew that he had been employed for the purpose of effecting the policy, and Mr. Smith knew that he was effecting the *policy, not for Skinner but for [8] Fisher. It was, therefore, a perfectly well understood transaction; the principal at Barrow-in-Furness had employed the local agent, the local agent had employed the agent at Liverpool, that agent thoroughly understanding for whom he was acting, and the principal thoroughly understanding that the local agent was acting for him. Under these circumstances it appears to me that the ordinary rule of law, that a lien would arise in favor of the broker who held in his hands the policy, could not but be applicable to this case. It is precisely the same as if there had been no intermediate agent at all, and as if Mr. Fisher had written direct to Mr. Smith to ask him to open a policy for him. Having opened that policy, and having got possession of it, he was not liable to give it up to his principal until he had received the premium, which he had either paid or become liable to pay, in respect of it. My Lords, it appears to me that up to this point, and looked at in this way, the case does not admit of argument.

But then it is said,—and it is upon this ground that Mr. Watkin Williams has based his argument,—conceding that there would have been originally, from the nature of the transaction, a lien in Smith as against Fisher and as against everybody, yet if you look at the case you will find that a bargain was made by the defendant Smith which was inconsistent with his having any such lien. And the learned counsel refers to paragraph 12 of the case, which says: “The course of business was for the said W. H. Brand or the defendant to effect the policy with the underwriters, and procure and deliver to Skinner & Co. copies of the policies.” Therefore the course of business, as there stated, was not to effect a policy and hand it over to Skinner, but to hand over to Skinner a copy of it. “And also to send to Skinner a debit note of the premiums paid, and at the commencement

of each month to make out and deliver to Skinner an account debiting them with the money due in respect of the premiums paid on the several insurances effected for them during the month then preceding, and on the 10th of each month the account of premiums paid on the preceding month was paid." That is to say, the course of business was, that when he had effected a policy he kept that policy in his own hands, he forwarded a copy of it to Skinner, and he debited Skinner 9] *for it in the general account of all the moneys that were due between them, which general account was paid at the end of the month, or at least on the 10th day of the following month. That was the mode in which the business was usually carried on. Then the case goes on: "It was not the usual practice for the defendant or Brand to part with the original stamped policies to Skinner & Co. until the premiums were received from Skinner & Co."

Now, My Lords, I confess, reading that as a statement of the way in which the defendant and Skinner carried on business, I am wholly at a loss to understand how that was inconsistent with the idea of Smith retaining the policy and retaining a lien. It is very true that it shows that the payment was, according to the common understanding between them, ordinarily postponed for a month or till the 10th day of the following month; but that postponement of the payment was not coupled with the giving up of the thing in the meantime. Undoubtedly a lien may be lost, as was suggested in the argument, in cases where the party agrees to give up the thing, making a bargain at the same time for payment on a future day. If the agreement is that the thing is to be surrendered and that the payment is to be postponed, that is inconsistent with a lien. But there is nothing inconsistent with a lien in saying, I will, for convenience' sake, take payment at the end of the month, and I will keep the policy in my hands in the meantime; if a loss should occur in the meantime and you want the policy, then you must pay the premium, but, subject to that event occurring, the premium need not be paid till the end of the month. It seems to me that that is the natural consequence and effect of the sort of agreement, as it is called, or rather the course of business which is here set up, and if the matter be viewed in that aspect, of course the ground taken by the appellant entirely fails.

As regards the remaining proposition which was argued, namely, that though there was once a lien yet that lien has been discharged, I have nothing to add to what has fallen from my noble and learned friend on the woolsack.

My Lords, I am therefore of opinion that the judgment of the court below should be affirmed.

*LORD O'HAGAN: My Lords, I am quite of the same [10 opinion, and I had some difficulty, I confess, in following the argument, ingeniously and forcibly as it was put.

There were two points argued in this case. On the first point, as to the existence of a lien, the matter stands in this way: it is found that the appellant here, Mr. Fisher, employed an intermediary to do his work, but the person who effected the insurance, the person who got the insurance made, and who paid the money for the making of it, and who got the policy into his hands, was the defendant, and that was with the full knowledge and assent of the plaintiff himself, because in the 5th paragraph of this case it is found that although Skinner & Co. were the persons directly employed, "the plaintiff generally knew the name of any insurance office with which Skinner & Co. effected policies, without the intervention of any broker, and in the present case had been informed, before receiving the covering note, that the policies which Skinner & Co. were authorized to effect, as above stated, had been effected through Brand and the defendant" at Liverpool. I do not say that that makes any great difference in the case, or that it would have been necessary for the case of the defendant that that should have been found; but it is a fact that what was done by the defendant here was done with the full knowledge, privity, and authority of Mr. Fisher, and in that way he became the authorized maker of this particular insurance.

Then it is said that the lien does not exist, because there is an antagonism between the contract made by the parties and the existence of a lien. I do not think that I can say anything more on that subject than has been said so very well by my noble and learned friend beside me. It seems to me, as plain as light, that the principle of antagonism, between a contract and the existence of a lien, does not apply to this case. The principle would have applied, if, in this case, there had been a contract that, on the making of the insurance, the policy should be given up immediately and absolutely; then the lien could not have existed without interfering with the contract between the parties. But that is not the ordinary bargain, and it is not found to be the bargain which existed between these parties; indeed, on the *contrary, the bargain was that the policy should re- [11 main with the person who had made it and paid for it, and that he should hold it until his debt should be discharged.

Therefore, I think upon the first branch of the argument there is nothing farther to be considered.

As to the second branch, I shall only say one word. If there was a lien in the case, the question is, how was that lien discharged? If Mr. Smith, having done this work, was entitled to be paid for it, how has he been paid? He has not been paid at all; *ex concessis* he never was paid.

But, my Lords, it was attempted to show that the payment which Mr. Fisher undoubtedly made to Skinner & Co. was a payment to Mr. Smith, the defendant. But how is that made out in any manner of way? It is said that according to the course of business he recognized a payment to Skinner as a payment to himself. He recognized nothing of the kind in the course of business. The course of business found to have existed on the face of this case was a course of business which led to the payment to Skinner by a monthly bill, and then a payment by Skinner to his under agent, this Mr. Smith, and why Mr. Smith should be bound to stop in the middle of that course of business so far as it helped him, I cannot at all understand. I put the question more than once myself to the learned counsel, whether or no there was anything in the case that would entitle him to contend that the intermediary had been constituted an agent to receive payment for the sub-agent, and the answer was that there was nothing of the kind. There is not a particle of evidence in the case, or any finding upon the case, that any such acceptance was ever authorized by Smith to the intermediary; and if not, I cannot at all comprehend how the payment to the intermediary can be held to have been a payment to the sub-agent. If that was no payment to him, and if he had a lien, the lien is there still undischarged in justice and in law.

I observe that in the court below, not a case of authority exactly, but a statement of the law was referred to, which I think I may very fairly and properly submit to your Lordships as covering, as the learned judge says who cites it, the whole of this case. It is from the 2d volume of Phillips on [2] Insurance, sect. 1909. *Your Lordships will observe how very fully it touches all parts of this case: "The agent who effects a policy for his principal, and advances the premium, or becomes responsible for it" (which is this case) "and retains the policy in his hands, has a lien upon it for his commission and the premium until the same are paid to him, or he is supplied with funds for the payment, whether his immediate employer is the assured himself or an intermediate agent, and in the latter case whether the intermediate agency was known or not known to the sub-agent claiming

the lien." Here there was an intermediate agent, here there was a sub-agent, and here the knowledge of the whole transaction was in the minds of all the parties. It appears to me quite impossible to contend, that, under those circumstances, this lien does not exist as fully now as it ever existed at any period of the transaction.

On the whole, my Lords, I have no doubt that the judgment of the court below was right, and that the appeal should be dismissed.

LORD SELBORNE: My Lords, I have but a few words to add to what has been already said. As to the cases of *Crawshay v. Homfray* (¹), and *Kirchner v. Venus* (²), I understand their principle to be this: that a lien cannot be claimed, so as to intercept the performance of the actual contract between the parties, whether that contract is express, or is to be inferred from a certain course of dealing. If the contract is to deliver goods at a certain time, or to deliver them whenever demanded, it would be inconsistent with that contract to refuse to deliver them (the proper time having arrived) upon the ground of any lien for a price, which by agreement was not then payable. Here, no such contract has been found by the special case; for, if, on the one hand, there was a course of dealing, according to which payment of the premiums was usually made to the broker by monthly settlements with his principal, it is also found (on the other hand), that it was not the course of dealing between these parties (for which purpose I identify Fisher with Skinner), that the policies should ever be delivered to the principal, until the premiums were actually paid *to the [13 broker. The true result is, in my opinion, that payment of the premiums was postponed till the monthly settlement, only when possession of the policies was not, in the meantime, demanded; but that, if the policies were sooner demanded, they were then to be delivered up to the principal, upon payment of the premiums, and not otherwise.

Judgment of the court below affirmed; and appeal dismissed, with costs.

Lords' Journals, 14th November, 1878.

Solicitors for appellant: *Chester, Urquhart & Co.*

Solicitors for respondent: *Sharpe, Parkers, Pritchard & Sharpe.*

(¹) 4 B. & A., 50.

(²) 12 Moo. P. C., 361.

[4 Appeal Cases, 18.]

H.L. (E.), Nov. 8, 12, 1878.

[HOUSE OF LORDS.]

THOMAS WARD, *Appellant*; and JOSEPH HOBBS,
Respondent ⁽¹⁾.

Implied Liability of Vendor of Goods—Statute.

A man may be morally, and, under the terms of an act of Parliament, legally culpable, and yet his conduct may not give any right of action to a private individual who suffers injury thereby.

A breach of a statutory duty may not constitute the foundation for a private right of action.

A statement that the purchaser of an article must take it "with all faults," and that the vendor will give no warranty with it, and will refuse all future claim for compensation (where the vendor does nothing to conceal defect), relieves the vendor from all liability in respect of any defect in the article itself.

Per THE LORD CHANCELLOR (Earl Cairns): If such a statement was followed by a declaration of the vendor (who knew the reverse) that he believed the article to be free from objection, there might be ground for an action of deceit.

Where a statute prohibited persons from sending animals affected with a contagious disease to market, and inflicted penalties on any person so sending them, the act of sending them, if known to be so infected, was a public offence, but did not amount by implication to a representation that they were sound, and did not of itself raise, as between the vendor of the animals and the purchaser of them, any right on the part [14] of the purchaser to claim *damages in respect of an injury he had suffered in consequence of their purchase.

Per LORD O'HAGAN: The statute in such a case was passed for the benefit of the general public, and had nothing to do with the private bargains of individuals.

In this case the Court of Appeal had reversed a judgment given by the Queen's Bench in favor of the plaintiff in the action, now the appellant here.

In August, 1875, Hobbs was possessed of a herd of about ninety pigs, forty of which were sold to a Mr. Farmer, a miller, residing near Thatcham in Berkshire. Farmer afterwards, on the 9th of September, complained to Hobbs that the pigs purchased from him scoured, and it was alleged that scour and want of appetite were symptoms of typhoid fever in pigs; Hobbs denied that he knew anything about the pigs being ill or affected in any way. On that 9th of September Hobbs sent to the Newbury market thirty-two of his pigs, to be there sold by auction; Hobbs would not give any warranty with them. Among the conditions of sale were the following:

"4. The lots, with all faults and errors of description (if any), to be paid for and removed at the buyer's expense immediately after the sale."

"6. No warranty will be given by the auctioneer with any

(1) Reversing 21 Eng. R., 140, and affirming 28 Eng. R., 142.

lot, and, as all lots are open for inspection previous to the commencement of the sale, no compensation shall be made in respect of any fault, or error of description, of any lot in the catalogue.

"7. If the purchaser shall neglect or fail to comply with the above conditions his deposit money shall be forfeited, and any lot or lots that may be unclaimed by the time limited shall be resold by public or private sale, and the deficiency (if any), together with the charges attending such resale, shall be made good by the defaulter at this sale."

There was an inspector of the market at Newbury, whose duty it was to report to the justices of the borough the state of the animals brought into the market. The inspector made his report in the usual way, saying that he had not observed anything objectionable in the pigs. Ward bought the thirty-two pigs at the auction, and paid £44 for them, which was a fair price at that time and place for healthy pigs. [15] They exhibited symptoms of illness on being driven to the plaintiff's farm, and all but one of them afterwards died of typhoid fever, and the plaintiff also lost some other pigs which he had bought of other people, and which he asserted had been infected with disease from Hobbs' pigs. He thereupon brought an action for damages to recover compensation for the loss he had thus suffered, and in his statement of claim suggested a warranty (1), and alleged that the pigs had been sent for sale at an open and public market at Newbury.

The cause came on for trial before Mr. Justice Brett at the Berkshire Summer Assizes in 1876, when the above facts were proved in evidence, and it was also proved that the pigs showed symptoms of disease as they were being driven from the market to Ward's farm. On the part of the defendant Hobbs there was the most positive denial that he knew or even suspected that the pigs were tainted with disease, and the sickness of the pigs shown on the way from Newbury market to the plaintiff's farm, was attributed to their being driven a considerable distance without food being supplied to them on the road. It was also urged that no veterinary surgeon had been called in to attend the pigs, nor had seen them until after death, so that he could form no idea as to the time at which the disease had first attacked them. Some evidence was given with a view to show that the defendant had been aware, before he sent the pigs to Newbury on the 9th of September, that they were infected

(1) The words were: "The plaintiff says, that by warranting certain pigs to be free from any infectious disease, the defendant sold thirty-two of such pigs to the plaintiff at and for the sum of £44."

with the disease. On the other hand the defendant's son was called as a witness, and swore that it was his duty to look after these pigs, that he had done so, and that he never had any reason to believe that they were suffering from any disease. The defendant's counsel relied upon the absence of any evidence of warranty, or of fraud, or deceit, or of false representation, or of the fact that the pigs were diseased at the time of the sale. The learned judge left the whole evidence to the jury, stating that in his opinion there was some evidence that the pigs had a disease at the time of the sale by auction, and that the defendant knew it; that he [16] must take the verdict of *the jury as to the cause of the death of the thirty-one pigs, and of the other pigs which died on the plaintiff's premises; and he asked the jury whether the defendant knew that his pigs had a dangerous and infectious disease. The jurors returned a verdict for the plaintiff, and assessed damages in respect of the loss of the thirty-one pigs and of the sixteen other pigs at £66. Leave to move to enter a verdict and judgment for the defendant was reserved. The motion was made in the Queen's Bench and the rule discharged (*). The case was taken to the Court of Appeal, where the decision of the court below was reversed and judgment entered for the defendant (*). This appeal was then brought.

Mr. *Henry Matthews*, Q.C., and Mr. *J. Bros*, for the appellant: There was evidence to go to the jury that the defendant knew that the pigs were suffering from a contagious disease at the time of the sale, and that he had acted in a manner calculated to deceive the dealers in the market; and for the purpose of deceiving them. Assuming the proof of his knowledge to be sufficient, then he was liable in damages, notwithstanding the absence of any direct warranty as to the soundness of the pigs. For his sending them to market under such circumstances was by the 32 & 33 Vict. c. 70, forbidden in express terms, and was an illegal act the doing of which subjected him to penalties. His sending them to market must therefore be treated as a representation that he was not doing what the statute forbade, and amounted to a representation which deceived the plaintiff into the belief that the pigs were fit objects of sale and purchase. Any one honestly acting on that representation, and then suffering from it because he had been deceived by it, as it was false, had a right of action in respect of the damage he thereby suffered. The violation of a statutory duty, if it occasioned damage to an individual, gave him a right to

(*) 2 Q. B. D., 331; 21 Eng. R., 140.

(*) 3 Q. B. D., 160; 28 Eng. R., 142.

recover damages. Now here the evidence was strong to show that the defendant knew that the pigs were diseased, and the jury had found that to be the fact.

[THE LORD CHANCELLOR referred to *Hill v. Balls* (*).] That case might be accounted for by the fact, that the declaration only *alleged a sale of a glandered horse, but [17 did not state anything which showed that the sale had been made in a place or manner forbidden by the statute. Here the statement of claim alleged that the pigs had been sent to "an open and public market at Newbury."

The defendant here must be treated as having made a misrepresentation on the subject, and must be subject to all the consequences of making it. This was not like the case of *Cook v. Waring* (*), which had been relied on in the court below, for here negligence was out of the question, for these pigs had been wilfully sent to market, and the *scienter* which was wholly wanting in that case, was abundantly proved here. *Baglehole v. Wallers* (*) was not applicable, for there, though the defendant knew of the defective state of the ship he offered for sale, and on that account would have been held liable, the ship was open to inspection, the defects in it were visible, and might have been seen at once by any one; while here the disease was and must be unknown to any purchaser, for no one could by mere inspection make himself acquainted with the fact of its existence. In *Bodger v. Nichols* (*) the defendant succeeded on the ground that there was no sufficient evidence that he had any knowledge that the cow he sold was diseased; but in the course of his judgment there, Mr. Justice Blackburn said (*): "I entertain no doubt, but it is not necessary to decide the point, that the defendant, by taking the cow to a public market to be sold, though he does not warrant her to be sound, yet thereby furnishes evidence of a representation that, so far as his knowledge goes, the animal is not suffering from any infectious disease. To say otherwise would be to run counter to the common sense of mankind." And the other judges expressed themselves in a similar way.

A representation, such as sending the pigs to a public market must be taken to be, subjects the offending party to criminal, and ought to subject him to civil responsibility. In *Rex v. Bernard* (*) a person at Oxford went into a shop attired in the cap and gown of a Fellow of a college, and so

(*) 2 H. & N., 299; 27 L. J. (Ex.), 45.

(*) 2 H. & C., 332.

(*) 3 Camp., 154.

(*) 28 L. T., 441.

(*) At p. 445.

(*) 7 C. & P., 784.

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obtained goods, and that was held to be a representation [18] which, being false, subjected him *to an indictment. In some cases a smaller matter had been held to make a party liable for the act of his agent. In *Hill v. Gray* (*) Lord Ellenborough distinctly laid it down that the vendor of a picture, whose agent allowed a person under a delusion as to its being the production of a particular painter, to become the purchaser, the agent knowing that it was a delusion, but not correcting it, must lose the sale. And in *Jones v. Bowden* (*) where there was, not a statutory duty, but merely a custom of the trade, to announce that goods had been damaged by sea-water and repacked, and goods which had been so damaged and repacked were sold without that notification, although the goods were left open for inspection, the seller was held liable to the purchaser for damage.

In *Richolz v. Bannister* (*) the doctrine of warranty of title was considered, and on the sale of goods, without any warranty of title given, the conduct of the vendor was held to amount to a representation that the person selling had a title to sell; and *Peto v. Blades* (*) showed that, under such circumstances as existed here, even the sheriff's auctioneer might be held liable for a representation made at the time of the sale, though there was no warranty given. In *Shepherd v. Kain* (*) a ship was described as "copper-fastened," but it was expressly declared that it was to be taken "with all faults"; it was open to inspection, it was purchased by the plaintiff, who proved at the trial that it was not what was called in the trade a "copper-fastened" vessel, and, notwithstanding the restriction as to taking it with "all faults," the seller was held liable. The offering of the pigs for sale was in this case an implied warranty that they were fit to be sold as pigs; it was certainly a representation which made the vendor liable. Even the gratuitous permission to use a thing—a loan of it—has been held to imply a warranty that it was fit for the use for which it was lent, and if injury followed from its known unfitness the lender has been held liable: *Blakemore v. The Bristol and Exeter Railway Company* (*). The knowledge was the principle [19] on which the court proceeded (*). In **Brass v. Maitland* (*) it was held that the shippers of goods were impliedly bound not to deliver on board ship goods of a

(*) 1 Stark., 434.

(*) 5 Taunt., 657.

(*) 4 Taunt., 847.

(*) 5 B. & A., 240.

(*) 17 C. B. (N.S.), 708; 84 L.J. (C.P.),

(*) 8 El. & Bl., 1035.

105.

(*) 8 El. & Bl., 1051.

(*) 6 El. & Bl., 470.

dangerous nature unless they were properly packed so as to prevent mischief arising from them. The same doctrine was, after the fullest deliberation, adopted and declared in *Burnby v. Bollett* (*); and *Emmerton v. Matthews* (*), where all the old authorities were cited and discussed, although in the latter case the defendant was held not to have incurred any liability. But that was because he had in fact bought an article which he believed to be good, and without taking it into his own possession had sold it again shortly afterwards to a voluntary bidder for it, having no reason whatever even to suspect that it was unfit for sale. The principle of all these cases was that if the seller had reason to doubt the soundness of the article sold, still more if he believed it to be unsound, he was responsible. Here the conduct of the defendant showed that he must have known that his pigs were infected, so he sent them to market, did not himself appear as their seller, but employed an auctioneer, and refused any warranty. The case was one peculiarly fit for the decision of a jury, and the jury felt no hesitation in declaring the defendant liable as a person who had sold with a full knowledge of the real state of the animals he sold.

Mr. *Benjamin*, Q.C., and Mr. *H. D. Green*, for the respondent, were not called on.

THE LORD CHANCELLOR (Earl Cairns): My Lords, in this case the respondent sold a certain number of pigs by auction at Newbury market, and the appellant became the purchaser of those pigs at auction. There were conditions of sale under which the pigs were sold, and the fourth and sixth of those conditions ran in these words: [His Lordship read them, see *ante*, p 12.] My Lords, it turned out that almost immediately after the sale the pigs, in the hands of the purchaser, showed unmistakable symptoms of being affected with a contagious and infectious disease, viz., typhoid fever; they rapidly died off, and nearly all *of them [20 ultimately died. Your Lordships have not heard the counsel for the respondent in this case, and therefore all that I shall say upon this head is this: that if the finding of the jury is a correct inference from the facts of the case, that the pigs were infected with this disease at the time of the sale, and the respondent knew it, then beyond all doubt the respondent was, both morally and legally, highly culpable.

But the question is, Is there a right of action on the part of the appellant?

Now the appellant in his claim puts the case in this way:

(*) 16 M. & W., 644.

(*) 7 H. & N., 586.

he says that by warranting the pigs to be free from any infectious disease the defendant induced him to buy them; and then he alleges that "even if the defendant did not warrant the pigs, the plaintiff says that the defendant either knowingly, or having good reason for believing that the pigs were suffering from an infectious disease, offered them for sale at a certain open and public market held at Newbury, and sold thirty-two of them to the plaintiff for £44;" then he says that "the defendant knew that the plaintiff was a farmer, and that the pigs would be placed with other pigs, and would also be turned into certain stubble fields."

Now with regard to the allegations in the statement of claim, undoubtedly there was no warranty, and the case in that respect is unsupported. As to the other allegation in the claim that, *simpliciter*, from the fact of his sending the pigs when they were in this state to the market, a right of action arises, that was not mainly, if at all, the ground upon which the case was rested at your Lordships' bar. The counsel for the appellant contended that from what took place at the trial, and afterwards, any technicality founded upon the claim was out of the question, and that the appellant might succeed, if he could, by showing that on the facts as they were proved there was any right of action on his part on any ground whatever.

The great contest at your Lordships' bar was this: the appellant contended that the respondent had made a representation which was untrue in point of fact, and that the action lay as in the nature of an action for deceit. Now, my Lords, there can, I apprehend, be no doubt of this proposition, that if a man expressly states upon a sale, that he 21] gives no warranty, and that the goods *sold must be taken with all their faults, but if he goes on expressly to say, in addition to that, that so far as he knows, or believes, or has reason to believe, the goods are free from any particular fault, and that the animals (if it be animals that are sold) are free from any disease, if I say he expressly states that, and if it can afterwards be proved that to his knowledge the animals were tainted with the disease to which he referred, then there can be no doubt that, notwithstanding the negation of warranty, an action would lie for deceit for the false representation. There is no difficulty in reconciling these two express statements, viz., the one express statement that he does not warrant, and that the property must be taken with its faults, and the other express statement that so far as he knows or believes, the article sold is free from a particular fault. Upon that part of the case, even if

your Lordships had heard the counsel for the respondent, there would, I think, have been no controversy.

But, my Lords, the question here is, not how two express statements of the kind that I have described are to be made to stand together, but whether in addition to the express negation of warranty which I have described, there was any other representation at all.

Now, my Lords, any representation in words there clearly was not in this case. The statement, and the only statement, actually made was the one contained in the two conditions of sale which I have read. Beyond that not a word was said or is alleged to have been said on the part of the auctioneer, and the respondent never, in any way, came in contact with the appellant. But what was contended at your Lordships' bar was this, that although there was no express representation made in words, yet there was conduct on the part of the respondent which amounted to a representation, and it was endeavored to make that out in this way: It was said, There is an act of Parliament, the Contagious Diseases (Animals) Act, which enacts that any person (I am stating the effect of the clause) who sends an animal having, at the time, upon it an infectious or contagious disease, to any public or open place, shall be guilty of an offence under the act, unless he shall prove that he was not aware that the animal was so tainted with disease; and it was said, therefore, that the respondent here from the mere fact of sending his pigs into a public market must be *taken, being of [22 course held to be aware of the law upon the subject, to be representing that he was complying with, or at all events not infringing, the law, and that the animals were not tainted with any infectious or contagious disease.

Now, my Lords, I think it always desirable to abstain as far as possible from expressing an opinion upon a case which is not actually the case under consideration, and I desire here to be held free from expressing any opinion as to what, in a case in which, there being no negation of warranty, no statement such as I have read from the two conditions of sale in this case, ought to be the law as to a man who sent his pigs to a public market knowing them at the time to be tainted with disease. I observe that in a case in the Court of Queen's Bench, *Bodger v. Nichols* ('), coming on appeal I think from a decision of a county court judge, my noble and learned friend Lord Blackburn (or, as he then was, Mr. Justice Blackburn), seems to have thrown out an opinion that in a case of that kind, there being nothing upon one

(') 28 L. T., 441.

side in the shape of statement or negation, and there being simply the fact of a man sending diseased animals to a public market to be sold, that must be held to be a representation by conduct that the animals were free from disease, and that the person so sending them might be liable for the consequences of that representation, if it turned out to be untrue. My Lords, I repeat that I desire, so far as I am concerned, to hold myself unpledged if such a case had to be considered. But that, as it seems to me, is not the case which your Lordships have now to consider. Your Lordships have here to consider an actual, clear, unqualified statement, in writing, on the one hand, and no statement whatever, even in mere words upon the other hand, but an attempt to raise a conclusion as to an implied statement from conduct. The words of the statement on the one side are perfectly clear; they are that the vendor will not warrant the goods—that they are open to inspection, that the purchaser might inspect them, and that the purchaser must take them with all their faults. Now, my Lords, I hold that in order to countervail or qualify that, and to cut it down, there must be something as clear in statement in an opposite direction. If there had been that representation in words which I began by supposing, namely, that notwithstanding that *negation of warranty the vendor said that he believed the animals were free from disease, that might be the foundation of an action for deceit; but it seems to me that there is no authority and no principle upon which, in the face of a clear and unqualified statement on the one hand, such as I have described, that the purchaser must take the articles with all their faults, you are to raise, from the mere circumstance of his sending the animals to the market, the implication of a representation on the other hand that the animals were in the belief of the vendor free from disease.

I, therefore, my Lords, on this part of the case entirely agree with that which was the unanimous conclusion of the Court of Appeal in this case.

But, my Lords, there were some minor points in the case suggested as arguments upon which the appeal might be sustained, and I will refer to them very shortly. Your Lordships have not heard the counsel for the respondents, and possibly there might be some question whether some of those points were open, but I will take them as they were urged.

The first of these which I call the subsidiary points in the case was this: it was said that there was here a breach of a

statutory duty, and that wherever you have a breach of a statutory duty and any person wronged by it, the person wronged has a right of action. Now I do not stop to consider how far that proposition can be supported as a general proposition; a good deal might be said upon that subject; but it is sufficient in the present case to point out to your Lordships that the statutory duty here is of this kind; it is a duty not to send infected animals into a public place; for an obvious reason, lest they should by contact or neighborhood taint other animals and thereby occasion injury to the public. If in that state of things some person had come forward and said, "You" (the respondent) "sent tainted animals into this public place, and my animals, in that public place, by contact or neighborhood were infected, and I suffered a loss," then I could understand the argument. But that is not what occurred here. What occurred in the public place was the buying and the selling, and no tainting of other animals, although it is said that after the pigs became the property of the purchaser and were taken to his farm they tainted other animals which were *there. [24 But that is not the gist of the enactment, and therefore it appears to me that this argument altogether fails.

The next of the subsidiary points was this: it was said that that which was sold here (this I think was rather a figurative expression than a serious argument) was not really a lot of pigs but a mass of disease—of typhoid fever. My Lords, to that all I can say is, that a pig having typhoid fever appears to me not to lose its identity any more than a man having typhoid fever ceases to be a man; and therefore the thing sold was that which it was professed to sell.

Then again it was said, and this was the last of the minor points, that what was sold here was not merely infected by disease, but was a noxious and dangerous thing, certain not only to be useless in itself but to be a source of evil and danger wherever it might be carried, and it was likened to the case of a person selling explosive substances without any warning being given to the purchaser, and without its being known or being made clear that the possession of the substances was attended with danger. My Lords, there again I should not wish to express any opinion as to how far that argument might be urged in a case where there was no express statement upon the subject of the thing sold; it is sufficient to say that it seems to me that where you have an article sold with a statement, not merely that the vendor does not warrant it, but that the purchaser must take it with all its faults, this point really becomes a branch of the first

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point to which I have referred ; and you cannot therefore contend that the purchaser is afterwards to be at liberty to turn round and say, "There was this fault in the article which I bought which makes it a dangerous article for me to become the possessor of."

My Lords, those were the arguments which your Lordships heard urged with great skill and ingenuity by the learned counsel on the part of the appellant, but it appears to me that they all failed, and that the decision of the court below ought to be affirmed. I move your Lordships, therefore, that the appeal be dismissed with costs.

LORD O'HAGAN: My Lords, I do not regard this case as 25] free from difficulty. *That it is not, the conflicting judgments we are required to consider make that very plain ; but, on the whole, I see no sufficient reason for declining to concur with the Court of Appeal.

The matter, as presented for the appellant, is of the first impression. No authority supports his contention. And its success would involve the establishment of a new principle, and the recognition of a legal presumption heretofore unknown.

The statement of claim relies upon a warranty, but makes no case of deceit or fraud, or failure of consideration, and contains no averment that the plaintiff was misled by any representation of the defendant. Warranty there was none ; but, on the contrary, the conditions of sale expressly declined the giving of any ; and purchasers were informed that they might make what inspection they pleased before the commencement of the sale, and that no compensation would be given "in respect of any fault or error of description of any lot in the catalogue." The very ingenious and exhaustive argument of Mr. Matthews addressed itself to several points which, as I observe, were not made in the pleadings, and with which the Lord Chancellor has dealt sufficiently ; but the real question is that which alone seems to have been raised and considered in the courts below, whether the offer for sale in open market, of itself, under the circumstances proved in evidence, amounted to a representation of soundness, imposing responsibility on the defendant for the loss which the plaintiff undoubtedly incurred ? I assume, for the purpose of the argument—according to the verdict of the jury—that the defendant knew of the diseased condition of the pigs when he sent them to market ; although, for my own part, having looked through the report of the trial, I am more than doubtful of the correctness of the finding in that respect. The positive testimony of the defendant to the contrary has strong corroboration in that

of the inspector (a veterinary surgeon) under the Contagious Diseases (Animals) Act. He examined the pigs in the discharge of his official duty, and believed them to be perfectly sound. But taking it as proved that the animals were known by the respondent to have disease, I should not be prepared to say, even in the absence of the conditions of sale on which he relies, that the non-disclosure of the fact would, without more, have cast liability for loss upon him.

*We must deal with the law as we find it, even [26 though we might desire, in cases of bargain and sale, to compel more full and candid statements on peril of grave responsibility; and that law is stated thus by Judge Story in his book on Contracts⁽¹⁾: "The general rule both of law and equity, in respect to concealment is, that mere silence with regard to a material fact which there is no legal obligation to divulge, will not avoid a contract, although it may operate as an injury to the party from whom it is concealed." And again⁽²⁾, "Although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee; yet, under the general doctrine of *caveat emptor*, he is not ordinarily bound to disclose every defect of which he may be cognizant, although his silence may operate virtually to deceive the vendee."

I take it that this is a correct statement; and so, as there was not in the present case any "legal obligation" to divulge the knowledge assumed to belong to the defendant, his simple failure to divulge it did not nullify the contract; and could not be taken, as the appellant insists, either as a representation of the soundness of the animals, or as a representation that he did not know them to be unsound. If the vendee bought at his own risk and in reliance on his own inspection without requiring a warranty, which he might have made the condition of his purchase, and if there was not—and no one says there was—any artifice or disguise on the part of the vendor, for the purpose of concealment, then I should be disposed to hold, if it were necessary to decide upon such a state of facts, that the mere silence, which he was not asked to break, did not impose responsibility. However, the case of the respondent is different and stronger, and we are not required to pronounce such a decision.

The argument of the appellant rests upon implication and inference arising from conduct; and, no doubt, conduct may amount to representation as clearly as any form of words. But the express declaration made in the conditions of sale,

(¹) Page 511.

(²) At p. 551.

in my opinion, forbade the implication and repelled the inference. The purchaser was informed that he would have no warranty, and that he was not to expect compensation 27] for any fault. He was told to inspect for *himself and to judge for himself, and warned that he must take the consequences of any error he might commit in making a bad bargain. He had the clearest intimation that the vendor, whatever might be his state of knowledge, expressly refused to give any help to a right decision or make any disclosure of any kind.

The legal result is stated very plainly by Lord Ellenborough in the familiar case of *Baglehole v. Walters* ⁽¹⁾, the authority of which has never, so far as I know, been called in question: "Where an article is sold with all faults I think it is quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser. The very object of introducing such a stipulation is to put the purchaser on his guard, and to throw upon him the burthen of examining all faults, both secret and apparent. I may be possessed of a horse I know to have many faults, and I wish to get rid of him for whatever sum he will fetch. I desire my servant to dispose of him, and instead of giving a warranty of soundness, to sell him with all faults. Having thus laboriously freed myself from responsibility, am I to be liable if it be afterwards discovered that the horse was unsound?" Now the defendant in this case did precisely what was held by Lord Ellenborough to protect a vendor against liability for all faults, "secret or apparent." And I repeat, it has not been pretended that he was guilty of any contrivance to conceal or to deceive. The condition of sale, by declining to compensate, suggested that there existed, or might exist, a state of things which, but for it, would entitle to compensation. It at once challenged inspection, and aroused attention to the probable necessity of making it, and so left the purchaser without reason to complain.

How is the force of this authority sought to be evaded? Only, so far as I understand the argument, by reliance on the Contagious Diseases (Animals) Act. It is said that this act, making the exposure in a market of animals affected by contagious disease a criminal offence, warrants purchasers in presuming that persons so exposing them intend to represent them, and represent them in fact, as free from such disease; and that, therefore, responsibility attaches as on a

(1) 3 Camp., 154.

warranty created through a representation by *con- [28
duct. This is very subtle and not very tangible reasoning,
and it has failed to satisfy my mind.

In the first place, the condition of sale, by its express refusal of warranty or compensation appears to me to negative the existence of any representation of the kind. It is distinct notice to all the world that there may be faults which the vendor does not choose to disclose, and for which he will not be accountable. Next, the assumption, and the gratuitous assumption is, that vendors and purchasers generally know not merely of the existence, but also of the terms of the act, and of its penal operation, and of its effect in probably deterring the owners of unsound cattle from bringing them to sale. There may be no such knowledge, and even if it exists, what reason have we for supposing that men will not violate the law and brave its penalties, taking the risk of discovery and the chance of escape? What right or reason has anybody to presume that the dealer, by the fact of his offers to sell, demonstrates, or intends to demonstrate, his compliance with the act, and consequently affirms the soundness of the animal?

In this case, if the jury's finding was correct, the defendant, knowing he would be guilty of a breach of the statute, subjecting him to punishment, ventured on it notwithstanding, and got off scot-free, for his pigs passed the inspector, and were pronounced to be without disease. Many similar transactions may and must take place, for obedience to the law cannot always be expected when evasion of it may be the source of profit; and I find it impossible to hold that the mere appearance of animals in a market can be reasonably presumed to imply their immunity from contagious illness in any case, and certainly not in a case in which the owner negatives any such implication by refusing to warrant and insisting on an acceptance "with all faults."

I cannot see any real relation between the penal statute and the contract we are considering, and I agree with Lord Justice Brett that the attempt to connect them is "illusory." The act was passed for the benefit of the general public; it has nothing to do with the bargains of particular persons.

Under such circumstances as are now before us, the presumption on which the appellant rests his claim to recover the compensation which the condition of sale forbade him to expect, seems to me to *have no foundation in fact [29
or law, and I concur with my noble and learned friend that the appeal should be dismissed with costs.

LORD SELBORNE: My Lords, I feel compelled to agree in the judgment moved by my noble and learned friend on the woolsack, though I confess I do so with some reluctance.

Upon the question of implied representation I have never felt any doubt. Such an implication should never be made without facts to warrant it, and here I find none, except that in sending for sale (though not in selling) these animals, a penal statute was violated. To say that every man is always to be taken to represent, in his dealings with other men, that he is not, to his knowledge, violating any statute, is a refinement which (except for the purpose of producing some particular consequence) would not I think appear reasonable to any man.

The argument which, for some time, most weighed with me was, that for a man to sell to another, without disclosing the fact, an article which he knows to be positively noxious, and which the other man does not know to be so (even though he expressly negatives warranty, and says that the purchaser must take his bargain with all faults) is an actionable wrong. I confess I should not be sorry if the law were so; but I know no authority for the proposition that such is the law, even with respect to the particular case of infectious disease in animals sold. The very nature of the condition that the buyer is to take the animals with all faults implies that they may be diseased, without any distinction between infectious and non-infectious disease; and I cannot think that the legislation, which has recently taken place in the public interest, against particular acts tending to propagate such disease, can make that an actionable wrong, as between the parties to a private contract, which would not be so without it.

Judgment of the Court below affirmed, and appeal dismissed with costs.

Lords' Journal, 12th November, 1878.

Solicitors for appellant: *Abbott & Co.*

Solicitors for respondent: *Richards, Walker & Maude.*

See 28 Eng. R., 157 note.

To constitute an offence under sec. 2070, R. S., 1881, in the sale of meat of diseased animals, or having the same with intent to sell, it was intended that the sale or intended sale must be for food, and that the defendant must have knowledge of the bad quality of the meat: *Schmidt v. State*, 78 Ind., 41.

A written contract for the sale of provisions "with all faults," a sample being shown at the time of sale, but

not referred to in the written contract, is not a sale by sample. Such a contract does not justify the inference that the provisions are fit for human food.

In a sale by sample merely, there is no implication that the bulk is equal to the sample, but only that the sample has been fairly taken from the bulk: *Service v. Walker*, 3 Vict. L. R., (Law), 348.

Where an article of food is purchased by description, the purchaser is

entitled to have a merchantable article of that description: *Jones v. Just* (L. R., 3 Q. B., 197) followed.

In an action claiming damages for delivery of flour inferior to that contracted for, the proper measure of damages is the difference between the value of the flour that ought to have been delivered, and the value of the inferior flour actually delivered; and no special damage can be recovered for the transshipment of such flour to a foreign country and the freight paid for its shipment back after rejection, unless both parties at the time of the contract contemplated the flour being so exported: *Spence v. Duffield*, 1 Vict., 49.

The distinction made by the principal case is between a duty for public benefit and one for the benefit of an individual, as distinguished from the public.

Where the law requires a public officer to perform an act for the benefit of an individual, i.e., to present a claim for audit or levy, he is liable to such individual for a refusal to perform the act: *Clark v. Miller*, 42 Barb., 255, 47 id., 88, 54 N. Y., 528.

A public officer charged with the performance of ministerial duties, who fails to discharge those duties with reasonable skill and care, is liable for damages resulting from such failure to one specially interested in the discharge of the duties: *Olmsted v. Dennis*, 77 N. Y., 378, 382; *Bassett v. Fish*, 75 id., 303.

A public officer is liable to private individuals for injuries resulting to the latter from his failure to perform ministerial duties, in which the latter have a special and direct interest. He is also liable for a failure to perform duties of a judicial nature, if he neglects them maliciously.

One who had purchased the equity of redemption of certain mortgaged lands, after a tax had been assessed thereon, had certain personal property on the land, but the tax collector falsely returned *nulla bona*, and the tax became a lien on the land from which the owner of the mortgage had to redeem after foreclosure. Held, that the latter had a right of action, at common law, against the collector for injury resulting to him in being compelled to redeem from the tax sale: *Raynsford v. Phelps*, 43 Mich., 342.

Members of a board of supervisors are personally responsible for negligence, in approving the official bond of a constable to which the names of the supposed sureties are forged: *Wasson v. Mitchell*, 18 Iowa, 153.

The act of the clerk of the court in passing upon the sufficiency of a stay bond is not a judicial one, and he is liable for any damage accruing to the judgment creditor by reason of his negligence in approving of an insufficient bond: *Hubbard v. Switzer*, 47 Iowa, 681.

A public officer is liable for damages for refusing to give copies of papers in his office on proper demand and tender of the legal fees. But such demand must not be accompanied with insult or abuse. Though if it be and a second demand be made in a proper manner, the officer is bound to comply with it: *Boyden v. Burke*, 14 How. U. S. R., 575.

Where a public officer knowingly makes a false record, and a person is injured in a transaction by reason of the fact that his agent charged with the whole business pertaining to the transaction is deceived by the record, the law will treat the principal as deceived, in the absence of evidence to the contrary, and hold such officer responsible: *Perkins v. Evans*, 15 N. West. Repr., 584, Sup. Ct. Iowa.

In an action against officers for refusing to approve an official bond, it is not sufficient to allege generally that the bond was good and sufficient. The facts should be stated which will show it to be in compliance with the requirements of the statute.

In an action on the case, by a county treasurer, against members of a board of supervisors, to recover damages for their refusal to approve the treasurer's bond given in lieu of a former one, on notice by his sureties, the declaration simply averred that the bond was good and sufficient; but failed to show, by the statement of facts, that it was such a bond as the statute required, or that it was executed and filed in the time required after the service of notice on him.

Held, on general demurrer, that the declaration was fatally defective, and showed no right to recover: *Kilgore v. Ferguson*, 77 Ills., 213.

Where the mayor of a city removes an officer in excess of his power, he is

responsible to such officer in a civil action for damages : *Burch v. Hardwicke*, 30 Gratt. (Va.), 24, 40-2.

See *Bradley v. Fisher*, 13 Wall., 335.

Though the municipality, of which he is an officer, is not liable : *Hines v. District of Columbia*, 8 Amer. Law Rec., 292, 7 Wash. L. Repr., 440.

Where, however, a duty is imposed upon a corporation, as such, instead of upon a *quasi* corporation composed only of certain officers, the members of the board of such corporation are not individually liable ; the neglect is that of the corporate body, not of the individuals composing it, and the liability rests upon it : *Bassett v. Fish*, 75 N. Y., 303.

Otherwise, it seems, where one of the members of the board has been duly charged by the corporation as its agent or servant, distinct from his relation as a corporator, with a duty the neglect of which brings damage to another : *Bassett v. Fish*, 75 N. Y., 303.

The complaint in this action alleged that the defendant was the head of the department of buildings in the city of New York ; that it was his duty to see that unsafe buildings in said city were taken down or made secure, and that he was furnished with the means necessary to fulfil the said duty ; that a building, known as No. 25 Duane street, was so injured by fire as to render it unsafe, and that defendant had notice of its condition ; that the said building fell upon an adjoining building in which the plaintiff's intestate lawfully was and killed her ; and asked judgment for damages against the defendant :

Held, that a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, should be overruled : *Connors v. Adams*, 13 Hun, 427.

A board of highway commissioners of a town is at most a *quasi* corporation. One member of such a board may be sued personally for negligence in suffering a highway to be in a defective condition ; and this is so, although the negligence be imputable to all : *Babcock v. Gifford*, 16 N. Y. Weekly Dig., 159.

To relieve the commissioners of highways of a town from personal liability to one who has been injured by their neglect to repair a defect known by them to exist in the highway, it is not

sufficient to show that they had no funds on hand wherewith to cause the necessary repairs to be made, but it must also be shown that they had sought through the proper channels to procure the said funds ; and their failure so to apply therefor will render them liable for the damages sustained by reason of such defect : *Warren v. Clement*, 24 Hun, 472.

Public officers charged with *quasi* public trusts, in the discharge of which private persons are interested under laws creating the obligations of contracts, are not answerable for the misconduct of their predecessors. If any former officer has been guilty of a breach of such a trust, he is responsible ; his successor is not. Each is answerable in his own term for his own discharge of duty : *Vose v. Reed*, 54 N. Y., 657.

See 21 Eng. Rep., 549 note ; 31 Eng. R., 557 note.

Ministerial officers can only be made liable to an individual for damages caused by an alleged nonfeasance, upon proof showing an omission on their part to perform a plain duty devolved upon them by law.

The commissioners appointed under the act of 1866 (chap. 826, Laws of 1866), to grade and improve Union street, in the city of Brooklyn, in the prosecution of the work constructed a swing-bridge on the street across Gowanus canal, and made and filed their report, and so transferred the bridge to the common council, as required by the act. No barriers were constructed to protect persons in the street from falling into the canal when the draw was open. Plaintiff, in endeavoring to save an infant brother who was about to go upon the bridge just as it was being swung open, slipped between the sidewalk and the bridge and was injured. In an action against defendants, the commissioners of the department of public works, to recover damages, it appeared that at the time of the accident the bridge and street were in the same condition as when transferred to the city, and that it was in charge of a keeper appointed by the police commissioners. Said keeper had previously notified the assistant engineer attached to the board of city works that the place was dangerous, and that two accidents had happened.

Held, that defendants were not liable; that assuming they could be made liable for damages sustained by reason of defects negligently suffered to exist in a street by virtue of the provisions of the city charter of 1873 (title 14, ch. 863, Laws of 1873), conferring upon the commissioners of said department the control and care of the city streets, no such liability was incurred here, as the street was in no sense out of repair, and the danger arose simply from the opening of the bridge by a keeper not under the control of defendants, but appointed by and under the control of the police board (see said charter, § 62, title 11), and defendants had no authority to appoint keepers to guard the approaches when the draw was open.

Also, that no liability was imposed upon defendants by the provisions of the act of 1874 amending said charter (§ 31, ch. 589, Laws of 1874), which requires the commissioners of the city works, in case any street becomes dangerous, to examine and repair the same, as neither the street nor the bridge were dangerous of themselves and were only made so by operating the latter.

It seems that the provisions of said charter (§ 27, title 19), providing that the city shall not be liable for the misfeasance or nonfeasance of its officers, but that the officer guilty thereof shall be liable, does not exempt the city from liability for failure to discharge a duty resting upon it, and which it has not devolved upon any of its officers, and that the liability for not guarding the bridge sufficiently when it was being operated for public use, rested upon the city, and the remedy is against it: *Fitzpatrick v. Slocum*, 89 N. Y., 358, distinguishing *Gray v. City of Brooklyn*, 2 Abb. Ct. App. Dec., 267.

The purchaser of a tax title, which proves invalid by reason of errors in the assessment, cannot sue the selectmen for errors which are not due to fraud, malice, or wilful neglect. Even if the original purchaser at a tax sale could maintain such an action, a purchaser under him could not: *Harris v. Willard*, Smith's (N. H.) Rep., 63, 73 note; see also *Hamilton v. Valiant*, 30 Md., 139.

It seems, there is no principle of the common law that will authorize a recovery for fraudulently procuring a false account to be audited by any officer or

board clothed with the power to audit and settle accounts against either the State, county or town. But for money fraudulently obtained, an action will undoubtedly lie: *Robbins v. Woolcott*, 66 Barb., 63.

The declaration alleged that defendant, as agent for the plaintiffs, undertook to expend certain moneys for them on certain roads and bridges; that he falsely and fraudulently represented to them that he had caused work to be done; and in collusion with the persons alleged to have done such work, and by drawing false orders in their favor containing such representations, caused a certain sum to be drawn out of the plaintiffs' treasury; whereas the work had not been done, and the plaintiffs thus lost the money. Common counts were added.

It appeared that the corporation by one resolution directed that \$300 should be granted to each councillor, defendant being one, to be by them expended on the roads, and by another that \$100 should be placed to the credit of each councillor to be expended by them on the roads and bridges in their respective divisions. This was in accordance with an established practice, by which the councillors superintended the laying out of moneys in their respective divisions. Defendant granted several orders on the treasurer to different persons as for "work done," which were paid, and it appeared that such work, though contracted for, had not then been performed. There was no evidence, however, of any fraud or collusion on defendant's part, or of any gain to himself, except to the usual charge to the corporation of the commission on such moneys as expended.

The jury having found for the plaintiffs on a direction that moral fraud was necessary to sustain the action:

Held, that though giving orders false in fact might raise a *prima facie* case, yet the proof that the work had been contracted for rebutted the charge of fraud. A new trial was therefore granted without costs.

Held, also, that there could be no recovery on the common counts, for defendant had received no money: *Chat-ham v. Houston*, 27 U. C. Q. B., 550.

No action will lie against a superintendent of the poor for neglect of duty in failing to audit, allow and pay by

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warrant the claim of one who has rendered services as a physician to a pauper, when the claimant has failed to present to him an itemized account, verified by his affidavit, as required by section 70 of 1 R. S. (6th ed.), 845: *Hawley v. McIntyre*, 24 Hun, 459.

Where a supervisor in good faith and in the proper discharge of his duties overflows adjoining lands, the remedy of the owner is by petition to the township trustee for damages, and not by an action against the supervisor personally: *Spitznogle v. Ward*, 64 Ind., 80.

If a town officer fraudulently obtains money from the town, he is liable for it personally. Public officers cannot commit a fraud officially, so as to subject their successors to liability therefor.

In counties where the poor are a county, and not a town, charge, money paid for either the permanent or temporary support of a pauper is the money of a county, and not of the town. Hence the town can have no color of right to recover it back from a person alleged to have obtained it fraudulently.

In counties where there is no county poor-house and the towns are severally liable for the support of their own poor, moneys raised for the support of the poor, placed in the hands of the overseers of the poor, and when an overseer pays out money for the support of a

pauper, or contracts for his support, he is entitled to appropriate the money in the first case, and retain it in his own hands, in the other.

He has absolute control of the fund, and is liable only for moneys not lawfully appropriated.

If an overseer of the poor, having money for the support of the poor in his hands, makes a contract with another for the support of a pauper, that is, within the amount which he has a right to furnish, he may properly charge it in account, and retain it in his settlement with the board of town auditors.

If he becomes personally liable upon such contract, by reason of his not having obtained an *order* for the support of the pauper, it is not fraudulent for him to protect himself against such personal liability upon his contract, by retaining the amount thereof out of money in his hands: *Robbins v. Woolcott*, 66 Barb., 63.

A contract by which a corporation binds itself not to exercise certain franchises committed to it by the State, for public purposes, is *ultra vires* and void, and cannot be set up as a defence in an action to compel specific performance of an obligation imposed by law upon such corporation, i.e., an agreement to surrender a right to purchase gas works after a specified time: *St. Louis v. Gas Light Co.*, 5 Mo. App., 485.

[4 Appeal Cases, 51.]

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[HOUSE OF LORDS.]

51] *W. GREGORY DAWKINS, *Appellant*; and the Right Hon. BARON PENRHYN, *Respondent* (¹).

Words to create a Trust—Statute of Limitations—Pleading.

A testator devised his estates to his son and his heirs male "in the fullest trust and confidence" that he would not do, nor permit to be done, "any act in law or otherwise" to defeat the thereafter declared trusts and limitations of the estates, but that, on the contrary, he would do all in his power to effectuate them. He then declared how the estates were to go if the son died without issue of his body lawfully begotten, specifically devising one-fourth portion to D. The son having entered into possession of the devised estates, suffered a recovery:

Held, that the words of the will did not create a trust, and that the entail was barred by the recovery.

(¹) Affirming 22 Eng. R., 846.

Per LORD PENZANCE : The right of a tenant in tail to enlarge his estate into a fee cannot be restricted by any expressions of a testator, the donor of the estate.

D. claimed, under a will executed in 1779, a certain estate, and the mesne profits accruing from the date when his father's title under that will first arose. The statement of claim itself set forth dates which showed his grandfather's title to have first arisen in 1840, and his father's title, on the death of the grandfather, in 1852. His father died in 1864, and he alleged that he himself first knew of his own title in February, 1875. He asserted the existence of an express trust under the will. The defendant put in a demurrer alleging that "the statement of claim was bad in law," denying that there was a trust so as to defeat the estates limited over on the death of the first tenant in tail without issue male, and it concluded with these words, "and on other grounds sufficient in law to sustain this demurrer":

Held, that this last sentence was sufficient to raise the defence of the Statute of Limitations.

There is a distinction between the Statute of Limitations and the Statute of Frauds. The latter must be pleaded. The title to the estate, not the mere right to proceed for its recovery, is affected by the former. If the plaintiff's statement of claim shows, on the face of it, that the time within which a title to land must be asserted has gone by, the defence of the Statute of Limitations may be raised on demurrer.

That defence was so raised without any distinct reference to the statute itself, and was *held* to be sufficient.

APPEAL against an order of the Court of Appeal affirming a decision of Vice Chancellor Malins (').

*The appellant had brought an action against the [52 respondent to recover an estate under a devise, and in his statement of claim set forth the following facts :

On the 25th of February, 1779, John Pennant, being seised of Penrhyn Castle and considerable estates belonging thereto, made his will, by which he gave his said estates to his son Richard Pennant (afterwards created Baron Penrhyn), and to the heirs of his body lawfully to be begotten, "upon special trust and confidence in his said son that in case he should leave no issue of his own body lawfully begotten, he his said son would not do or suffer any act in law or otherwise to obstruct or prevent the following devises, trusts, and limitations of the said testator's estates and plantations from taking effect ; but, on the contrary, that he the said Richard would do or cause to be done every act in his power to establish or confirm the same." The will then gave the estates to certain persons upon trust for George Hay Dawkins (who afterwards took the surname of Pennant), the second son of his nephew Henry Dawkins (in the statement afterwards called Henry Dawkins the elder), or such other son of that person as should for the time being happen to be his second son, and Edward Gregory Morant, the second son of another nephew, "for and during the term of their respective lives, without impeachment of waste, to be equally divided between the said G. H. D. Pennant and the said E. G. Morant, share and share alike ; and from and after the decease of the said

(') 6 Ch. D., 318 ; 22 Eng. R., 845.

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George Hay Dawkins, &c., as to one full moiety thereof, &c.; and in case the said George Hay Dawkins should die leaving no issue male of his body lawfully begotten, then in trust for Henry Dawkins (afterwards called Henry Dawkins the younger), the third son of Henry Dawkins the elder, for his life without impeachment of waste; then in trust for the first son of Henry Dawkins the younger, and the heirs male of the body of such first son, with remainders over for default of issue."

The testator died in 1782. His son Richard (afterwards created Baron Penrhyn in the Irish Peerage) entered into possession of the estates, and immediately afterwards suffered a recovery of the said estates. He died in 1808, leaving no issue him surviving.

On the death of Richard Baron Penrhyn, George Hay Dawkins, the second son of Henry Dawkins the elder, took [53] the name of *Pennant and entered into possession of the estates devised. George Hay Dawkins Pennant died in December, 1840, leaving no issue male of his body.

On his death Henry Dawkins the younger (the third son of Henry Dawkins the elder) became entitled as tenant for life to the said fourth part. He died in October, 1852, leaving Henry Dawkins (called Henry Dawkins the son), his eldest son and heir-at-law, him surviving, who thereupon became entitled as tenant in tail of the said fourth part. Paragraph 10 of the statement alleged that "The said Henry Dawkins the son, was at that date, and continued till his death to be, ignorant of his right to the possession or to the receipt of the rents and profits of the said fourth part of the said Penrhyn Castle and hereditaments." Paragraph 11. "The said Henry Dawkins the son died on the 13th of November, 1864, leaving the plaintiff, his eldest son and heir-at-law, him surviving; and the plaintiff thereupon became, and he still is, entitled as tenant in tail under the said will to the possession or the receipt of the rents and profits of the said one-fourth part of the said Penrhyn Castle and hereditaments."

Paragraph 12. "The plaintiff was ignorant of the trust, or restriction on alienation, contained in the will of the testator until the month of February, 1875, when a copy of the will was found and handed to the plaintiff. Prior to this date, viz., February, 1875, the plaintiff had never heard or known that any such will had ever been made or executed by the testator, or that he the plaintiff or his father, Henry Dawkins the son, or his grandfather called Henry Dawkins the younger, was, or had been, entitled to any share or inter-

est in the property devised thereby, by virtue of any limitation therein contained or otherwise."

Paragraph 13. "The defendant entered into possession upon the death of George Hay Dawkins Pennant and has since continued in such possession." Paragraph 14. "The defendant claims to be entitled under the will of the said G. H. D. Pennant, and he claims that the said George H. D. Pennant acquired the fee simple and inheritance of the said fourth part under a devise thereof to him by Richard Baron Penrhyn, and that the said Richard Baron Penrhyn acquired the fee simple under and by virtue of a common recovery alleged to have been suffered by *him in 1782. [54 Paragraph 15. "The plaintiff submits that any such recovery was invalid at law, or, at all events, in equity, to defeat the estates limited over in case the said Richard Pennant (Baron Penrhyn) should die leaving no issue of his body lawfully begotten, and that such estates have taken effect at law, or at all events in equity, and that the plaintiff is now entitled as tenant to the possession or receipt of the rents and profits of the said undivided fourth part of the said Penrhyn Castle and hereditaments."

The plaintiff therefore prayed that the will of John Pennant might be established and a declaration made of the plaintiff's right to the fourth part, and possession thereof delivered, and he also claimed £150,000 for mesne profits, and prayed for farther relief.

The defendant demurred to the statement of claim on the ground that the alleged trust could not operate to prevent Richard Baron Penrhyn from suffering a recovery of the moiety of the hereditaments devised by the will, and that the recovery suffered in 1782 was valid in law and equity so as to defeat the estates limited over in case the said Richard Baron Penrhyn should die leaving no issue of his body lawfully begotten. The demurrer concluded thus, "and on other grounds sufficient in law to sustain this demurrer."

On the 6th of June, 1877, Vice-Chancellor Malins made an order allowing the demurrer and dismissing the claim, which order was affirmed on appeal. This appeal was then brought.

Mr. *Higgins*, Q.C., and Mr. *J. F. Oswald*, for the appellant: The words of this will constitute an express trust, and therefore render the provisions of the 3 & 4 Will. 4, c. 27, inapplicable. The very word "trust" is used in the will to describe the duty of the first taker of the estate. But without that word the trust might be created: *The At-*

torney-General v. The Wax Chandlers Company ⁽¹⁾. In *Kennedy v. Daly* ⁽²⁾ there was, in a marriage settlement, an agreement, by a Papist, to convey to trustees lands for the purposes of the settlement, if he should become qualified to do so. By a change of the law he did become qualified, 55] and *the agreement was treated as a trust, and a fine and non-claim by the trustee were held not to affect the right of the *cestui que trust*. In *Wright v. Atkyns* ⁽³⁾ there was a devise to "A. and her heirs forever, with the fullest confidence that after her disease she will devise it to my family." The words there were not nearly so strong as in this case, and the word "trust" was not employed, yet they were held to give A. only an estate for life and a trust for the heirs of the donor, as *personæ designatæ*. In *re Macleay* ⁽⁴⁾ recognized the same principle. *The Commissioners of Charitable Donations v. Wybrants* ⁽⁵⁾ decided that if the gift was express, as it certainly was here, and if the person taking the estate was bound to give effect to the gift, as he was here, it was an express trust. A legacy may be so charged on an estate as to take the character of a trust, *Thomson v. Eastwood* ⁽⁶⁾; and then the Statute of Limitations becomes inapplicable. In *Fleeming v. Howden* ⁽⁷⁾ Lord Westbury stated the broad principle ⁽⁸⁾ that "an obligation to do an act with respect to property creates a trust." The first taker of the estate here being without lawful issue, was really in the condition of a tenant for life, with a devise over at his death, and had no power to bar. In *Chamberlayne v. Chamberlayne* ⁽⁹⁾ there was a devise of freeholds to A. to hold to him and his heirs male forever, but if he should die without leaving any son of his body, subject to the payment by A. of certain sums to A.'s daughters, and it was held that A. took only as the successor by a recovery. The estate was plainly given, the person to whom it was to go was designated, and the directions of the will ought to have been followed: *West v. Holmesdale* ⁽¹⁰⁾, *Cunningham v. Foot* ⁽¹¹⁾ was not adverse to this appellant; for there could be no doubt, on the very words of the will, that no trust was there created, and the whole purport of the will showed that none could be implied. The principles declared in *Salter v. Cavanagh* ⁽¹²⁾ were clearly in favor of the

⁽¹⁾ Law Rep., 6 H. L., 1; 4 Eng. R., 90.

⁽²⁾ 1 Sch. & Lef., 355.

⁽³⁾ 17 Ves., 255.

⁽⁴⁾ Law Rep., 20 Eq., 186; 13 Eng. R., 719.

⁽⁵⁾ 2 J. & Lat., 182.

⁽⁶⁾ 2 App. Cas., 215; 19 Eng. R., 43.

⁽⁷⁾ Law Rep., 1 H. L., Sc., 372.

⁽⁸⁾ Law Rep., 1 H. L., Sc., at p. 383.

⁽⁹⁾ 6 El. & Bl., 625.

⁽¹⁰⁾ Law Rep., 4 H. L., 543.

⁽¹¹⁾ 3 App. Cas., 974; 24 Eng. R., 575.

⁽¹²⁾ 1 D. & Wal., 668.

appellant. A direction to do a certain act, and to do it in a certain way, and, beyond that, not to do anything to defeat it, was imposed on the beneficiary *under the will, and [56 he was under an obligation to obey that direction in the form expressed, and was a trustee for that purpose: *West v. Holmesdale* (').

As to the suffering of a recovery. In the first place, the first taker of the estate had no right to suffer one; not only because under the terms of the will he was not properly a tenant in tail, but also because by the express terms of the will he was forbidden to do "any act in law or otherwise" that could affect the trusts and limitations of the will. And in the next it is denied that there is here any sufficient allegation that a recovery had been suffered. In *White v. Smale* ('), in a bill brought against B. and C., the plaintiff stated a circumstance which was material to charge C., not positively as a fact, but as an allegation made by B., and a demurrer by C. was on that ground allowed. That case is directly applicable to the statement here. *Mainwaring v. Baxter* (') is no authority here, for in that case the whole scheme was held to be a trick to defeat the law against a perpetuity, and was therefore overruled by the court.

As to the Statute of Limitations itself. The defence on account of that statute must be pleaded. In *Aggas v. Pick-erell* ('), Lord Hardwicke had refused to admit such a defence on a demurrer. The statute does not directly apply to equitable rights such as are the foundation of the claim here, and at law it is well settled by practice and by decisions that it cannot be taken advantage of but by pleading, even though on the face of the declaration it should appear that the debt claimed by the plaintiff had accrued twenty years before action brought: *Lee v. Rogers* ('); *Williams' Saunders* ('). Even the most modern practice introduced by the Judicature Acts, and the Orders and Rules under them, contained nothing contrary to this rule of pleading, but required that a substantive defence, such as that of the Statute of Limitations, which does not deny the cause of action, but only asserts that the remedy has been taken away, should be pleaded ('). And in **Catling v. King* ('), [57 with regard to another statutory defence, that of the Statute of Frauds, it was held that the defence of the Statute of

(') Law. Rep., 4 H. L., 543.

(') 22 Beav., 72.

(') 5 Ves., 458.

(') 3 Atk., 225.

(') 1 Lev., 110.

(') 2 Wms. Saund., 63 b. See also 1

Wms. Saund., 282, n. 2; 2 Wms. Saund., 626, n. 6; Chitty on Pleading, Vol. i, page 506, n. (s); Vol. iii, pp. 126-172.

(') Judicature Act, 1875, Order xix, rule 18; Order xxviii, rule 3.

(') 5 Ch. D., 660.

Frauds cannot now be raised on demurrer. And though in *Wood v. Midgley* ⁽¹⁾ that defence had at one time been allowed to be so raised, it was to be observed that the demurrer there distinctly, in terms, set up the statute, and alleged that the agreement sought to be enforced was not made in the manner "lawfully authorized by the Statute of Frauds." Here there is no reference whatever, in the demurrer, to the Statute of Limitations. Now the Order XXVIII, rule 2, requires that the nature of the defence should be stated, and *Catling v. King* ⁽²⁾ is a clear authority that this defence cannot now be raised by demurrer. The defences on the two statutes are precisely similar in their nature—they both admit the existence of a cause of action, but both assert that there is a matter of law that prevents the action from being maintained. To each there may be answers in fact and in law, and the plaintiff ought not in any case to be taken by surprise by a demurrer which does not specify the nature of the defence, and so deprives him of the chance of replying to it.

Mr. *Southgate*, Q.C. and Mr. *Joshua Williams*, Q.C. (Mr. *Dart* and Mr. *W. Barber* were with them), for the respondents, were not called on to address the House.

THE LORD CHANCELLOR (Earl Cairns): My Lords, this case has been very frequently described by the learned counsel for the appellant as a "very important case." I infer that the amount of property sought to be recovered is considerable, and therefore no doubt it would be a matter of importance for the appellant to recover that property, and I dare say a matter of importance to the respondent to lose it. In that sense the case may, no doubt, be an important case; but if it is meant that the case is a case of importance as involving a legal question of nicety or difficulty, I cannot agree with that description of it. It appears to me to be one of the clearest cases which ever was presented for the decision of a court.

Now, my Lords, in the first place it is objected that the 58] decision *has been given upon demurrer on the ground of what is called the Statute of Limitations, although the demurrer only mentioned another ground. No doubt that is so; but with regard to the statements in the bill, I understand them to be clear and distinct, and indeed it has not been argued that there is anything ambiguous or doubtful in the statements upon the bill so far as the Statute of Limitations is concerned. The bill states in substance that the plaintiff has not been in possession or receipt of the rents of

⁽¹⁾ 5 De G. Mac. & Gord., 41.

⁽²⁾ 5 Ch. D., 660.

the property he seeks to recover within twenty years, and in truth there can be no doubt about that, because he goes on to say that he did not know he was entitled to them, therefore he could not have been in receipt of them, or in possession. So far, therefore, as the fact is concerned, it is averred distinctly in the bill. It is also perfectly clear that the pleader had before his mind the difficulty raised by the Statute of Limitations, because he endeavors to obviate the conclusion of law which would follow from the fact that he was not in possession within twenty years by statements intended to raise the question of a direct trust, which I will afterwards deal with. He, therefore, had distinctly before his mind the difficulty arising from the Statute of Limitations.

In that state of things a demurrer was put in, a demurrer which, so far as regards the expression of the ground, mentioned another ground of demurrer; but the law always has been, and the law continues to be, that in addition to a specified ground of demurrer you may, at the bar, allege any other ground of demurrer which appears upon the face of the bill. The point, therefore, came in the argument before your Lordships to this: it was contended on the part of the appellant that, whether you specified your ground of demurrer or not, you could not now demur, by reason of the Statute of Limitations applicable to real property.

My Lords, I conceive that there can be, and ought to be, no doubt at all upon that point. The analogy which was referred to of the Statute of Frauds is not an analogy of any weight. The Statute of Frauds must be pleaded, because it never can be predicated beforehand that a defendant who may shelter himself under the Statute of Frauds, desires to do so. He may, if it be a question of an agreement, confess the agreement, and then the Statute of Frauds will be inapplicable. With regard also to the *Statute of Limita- [59
tions as to personal actions, the cause of action may remain even although six years have passed. It cannot be predicated that the defendant will appeal to the Statute of Limitations for his protection; many people, or some people at all events, do not do so; therefore you must wait to hear from the defendant whether he desires to avail himself of the defence of the Statute of Limitations or not. But with regard to real property it is a question of title. The plaintiff has to state his title, the title upon which he means to rely, and the Statute of Limitations with regard to real property says that when the time has expired within which an entry or a claim must be made to real property, the title shall be extinguished and pass away from him who might have had

it to the person who otherwise has the title by possession, or in whatever other way he may have it. Therefore, if upon the face of the bill the plaintiff states that the period allowed by the statute has expired, he states in law that his title is extinguished, unless indeed he can bring himself within some of the exceptions under which the statute allows his title to continue. It is therefore clearly a case in which a demurrer where the facts appear upon the bill is applicable as a mode of defence, and I repeat that there could have been no surprise in this case, because it is obvious upon the face of the claim itself, that the plaintiff felt the difficulty by reason of the Statute of Limitations.

My Lords, I pass therefore from the argument upon the technicality that the defence was not properly raised. In my opinion it was properly raised.

I now turn to that which is said to get rid of the difficulty of the Statute of Limitations, and if that to which I am about to refer does not get rid of the statute, the statute remains a fatal impediment in the way of the plaintiff. Now, what is said to get rid of the statute is this; it is said that there is here in the devise, which is the root of the title for this purpose, a devise in the will of John Pennant, the testator, which is an express trust, and that the 25th section, therefore, of the Statute of Limitations, which deals with the case of an express trust, prevents the statute running. The 25th section is this, "That when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a 60] *suit against the trustee or any person claiming through him, to recover such land or rent shall be deemed to have first accrued," when there has been a conveyance, "to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him." You must therefore have a trustee, a *cestui que trust*, and an express trust.

Now let us see whether there is here an express trust. What the will says is this: there is a devise to Richard Pennant and to the heirs of "his body lawfully to be begotten," which would create an estate tail, "but upon special trust and confidence in my said son that in case he shall have no issue of his own body lawfully begotten that he" "will not do or suffer to be done any act in law or otherwise to obstruct or prevent the several following devises, trusts, and limitations of" the testator's "estates and plantations from taking effect, but on the contrary that he will do or cause to be done every act in his power to establish and con-

firm the same;" and then, in case he dies without lawful issue, there are devises over, under one of which it is said that the plaintiff would ultimately become entitled.

Now with regard, in the first place, to this being an express trust, I am of opinion that it is not an express trust at all. I do not for a moment mean to say that you may not have a trust of an estate tail. I can conceive, although it would be a strange and unusual mode of conveyancing, a conveyance or a devise to a man and the heirs of his body in trust for A. B., and his heirs; and then the estate tail would be held in trust for A. B., and A. B. could call upon the tenant in tail, I dare say, to bar the estate tail and to enlarge it into a fee for his benefit. That would be an express trust, and there would be a trustee and a *cestui que trust*. But although I find the words here, "special trust and confidence," taking the whole of the sentence, it really is not a special trust at all, but an injunction against barring the estate tail; a direction if you like, an injunction if you like, an expression of confidence if you like, an expression of trust if you like, but all centring in this, that the estate tail is not to be barred. But that cannot be done; you cannot give a man an estate tail and express your confidence that he will not bar it; you cannot *give a man an estate [6] tail and say, I lay it upon you as a trust upon your conscience that you shall not bar your estate tail. The law does not permit that to be done. It is therefore playing with words to say that there is here anything of an express trust; as an express trust is meant to express the relationship between a trustee and a *cestui que trust*.

But, my Lords, let me go a little farther. What about a trustee? If there is a trustee, it is the devisee, Richard Pennant Baron Penrhyn. The devisee, Richard Pennant Baron Penrhyn, had an estate to him and the heirs of his body, and that which is called a "trust and confidence" was a trust and confidence that he would not do or suffer anything to obstruct the subsequent limitations over taking effect. Therefore, if there be a trust (which I have already denied) he, and he only, is the trustee, or, if you like, he and the heirs of his body; and when they came to an end in 1808, the trustee upon whom the injunction was laid came to an end also. There was no person else who could have barred the entail or prevented the limitations over taking effect, and the trust, therefore, could only be coextensive with that period during which the thing which was deprecated, and desired not to be done, could have been done.

But the matter does not stop there. When Richard Baron

Penrhyn died in 1808 without issue the estate tail came to an end. The claim avers that thereupon George Hay Dawkins who, for the purpose of the present controversy, is the only person we have to look to, entered into possession and continued in possession until 1840. But he was the person in remainder after the estate tail, and if the estate tail was not barred, he was the person rightfully to succeed to the estate in remainder. Now the plaintiff is in this dilemma; he must either say that the estate tail was barred by Richard Lord Penrhyn, or that it was not. I understand that in the court below he desired to say that it was not barred, but he may have his choice; it must be one way or the other; either the estate tail was barred by the tenant in tail, or it was not. Now let us suppose that it was barred; if the estate tail was barred by Richard Lord Penrhyn, then the prohibition against barring being invalid, an estate in fee simple was created absolutely, discharged from every 62] claim upon that estate. But if, on the other hand, the estate tail was not barred by Richard Lord Penrhyn, then the entry by George Hay Dawkins was an entry as in remainder, and the thing which the testator had begged and entreated might not be done, was not done. The estate tail was out of the way, the remainders would take effect and there was nothing to prevent, in the rightful course of those remainders, the plaintiff entering into possession if he was entitled so to do.

Therefore there appears to me here every possible impediment in the way of the appellant. There was, in my judgment, no express trust, there was in my opinion no trustee, and there was not, I think, any person who could be called a *cestui que trust*. The plaintiff either is barred by the circumstance that a recovery was suffered, if a recovery was suffered, or if a recovery was not suffered, there was nothing to prevent all the limitations in the will taking effect in their natural order, and there is nothing, therefore, in the averments of the plaintiff to show any reason why at the time he was entitled to possession he did not claim and enter into that possession. The case, therefore, seems to me to be free from any kind of doubt or ambiguity.

The only other observation I have to make is with regard to the question of leave to amend. I gather that no leave was asked in the court below, and I am not surprised at that, because it is quite clear that, even now, no suggestion can be made, much less could any evidence be given that anything could be introduced into this bill by way of amendment which would in the slightest degree alter the case of

the plaintiff. I think it is the only thing we can look upon with satisfaction in the case, that more money has not been thrown away by a more elaborate litigation which, as it appears to me, must have ended, as this must end, in the defeat of the appellant's claim.

I therefore move your Lordships that the appeal be dismissed with costs.

LORD PENZANCE: My Lords, I entirely agree in the opinion which has been just now expressed to the House. I think that the case upon the merits has been so fully explained in the judgments of the court below and by my noble and learned friend that I should add *nothing to it in point [63 of clearness if I were to go over the ground again.

The plaintiff really is barred by the Statute of Limitations. The events which have occurred, and the time which has elapsed, place it beyond doubt that he is barred by the Statute of Limitations, unless he can show that which he has attempted to show, namely, that the Statute of Limitations does not apply in this case, because in the original devise there was an express trust created. Now, my Lords, with reference to the creation of that trust I agree with what has just been said. I have the greatest possible difficulty in comprehending how language of the character which is here used, can be construed into the creation of what is commonly called a trust, because it appears to me to be lacking in the elements of a trust. I have some difficulty in seeing that there was any *cestui que trust*; or that there were any persons who could properly be called trustees. The language of the will, no doubt, includes within it the word "trust," but if the language had been otherwise, the meaning would have been precisely the same. If instead of saying that it was upon "the special trust and confidence" that in a certain event the estate tail should not be barred, the testator had said, "I forbid," or "I interdict the devisee from barring the estate tail," no question about trust could possibly have entered into anybody's mind. The mere use therefore of the word "trust," in the absence of those elements which belong to a trust, appears to me to fail in creating a trust.

My Lords, this question has been considered really in every aspect, and I would call your Lordships' attention to the way in which it has been put by the learned Master of the Rolls. He says: "The way to try it is this: suppose instead of the words that are after 'upon special trust and confidence,' I had got these words, 'but upon special trust and confidence in his said son that in case he should have

no issue of his own body (for that is what it means) he should convey the estate to John Smith,' could any one doubt then that the estate to John Smith was after the estate tail? If it is after the estate tail, whether it is in defeasance of the estate tail, or whether it is in remainder after the estate tail, it is liable to be destroyed by the tenant in tail suffering a recovery before the passing of the act for the [64] abolition of fines and *recoveries, or by now executing a disentailing deed. In other words, the right of the actual tenant in tail to enlarge his estate to a fee simple, cannot be restricted by any attempt on the part of the settlor or testator by inserting clauses either that he shall not exercise the right or by defeating the estate tail in case he exercises the right." Now my Lords, I conceive that that is unanswerable. This clause, whichever way it is looked at, really is nothing more or less than an interdict upon barring the estate tail, an interdict which is contrary to the law.

So much, my Lords, upon the merits of the case. But it has been said that this matter has not upon the pleadings been treated in a way to do justice to the plaintiff; it is said that the defence cannot be raised upon demurrer. I think the analogy drawn from cases in which the Statute of Limitations is applicable to debts at common law is an analogy that fails, for the reason which has just now been mentioned to the House. The Statute of Limitations as applied to debts is a statute that does not put an end to the debt, it merely prevents the remedies; and it may be taken advantage of, or it may not be taken advantage of, according to the volition of the defendant. But the Statute of Limitations applying to real property, as has been pointed out, does more than that; it goes to the root of the plaintiff's claim. As the learned Master of the Rolls said, "in that case it is not a bar of the claim, it is a divesting of title, or a transference of title to somebody else. If, therefore, it appears on the face of the claim that the title which once was in the claimant has passed to somebody else, that is a good ground for demurrer." That, again, I think seems unanswerable. If the result of the statute is, that, upon the face of the claim as stated, the title is no longer in the plaintiff, surely that is a matter which may be raised by demurrer.

But then—and this is the part of the case which I listened to with anxiety to see whether one could with certainty feel that justice had been done—it was said, "But the demurrer itself when it came did not give the plaintiff any idea that this point as to the Statute of Limitations was about to be

raised." Now, my Lords, upon that I was, as I say, anxious to hear what could be said most fully, because if I were of opinion for a moment that the plaintiff had been placed at an unfair disadvantage, I for one should not *be pre- [65
pared to affirm this judgment. But I cannot see that that is so. I do see upon the face of the claim indications that the learned counsel who prepared the claim on the part of the claimant evidently had in his mind the Statute of Limitations, because he stated matters which had no relevancy whatever unless they were intended to apply to the defence of the Statute of Limitations. I allude to the statement that the plaintiff was ignorant of the existence of the will, and some other matters which are stated.

But a complete answer as it seems to me to this matter of complaint after all lies in this, that when the case came to be argued in the court below and when, as the plaintiff would say, this defence of the Statute of Limitations was sprung upon him unawares, the natural and inevitable thing to do, supposing that he had any answer to that defence, supposing that he was able to put forward any circumstances which would relieve him from the operation of the statute, would have been for his counsel to say that they desired to amend their claim, that they were not aware that the Statute of Limitations would be pressed against them, that the demurrer had given them no notice of it, and that upon leave being given to them to amend their claim they could state facts which would entirely relieve them from the pressure of the statute. It appears to me that no learned counsel, certainly not the two able counsel by whom the claimant was represented in this case, would have failed to take that step, if the plaintiff was able to state such facts. And even at the bar of this House, although I have heard a great deal about the injustice done to the plaintiff by this demurrer, I have not heard it stated that there are any facts which would take the case out of the statute.

Under those circumstances, my Lords, I am satisfied that the judgment of the court below ought to be affirmed.

LORD O'HAGAN: My Lords, I am quite of the same opinion. This was a very hopeless case from the starting point. It has been presented to us by Mr. Higgins and his learned colleague with all the ability that could have been applied to it: but they have failed, at all events so far as I am concerned, to make any impression either as to the matter of practice, or as to the matter of law.

*First, as to the matter of practice, I felt, with my [66
noble and learned friend who has just addressed the House,

that if there had been any oversight on the part of counsel or any mistake on the part of the court, it would behove us to take every means within our power of rectifying a possible error, and putting the case in train for full and satisfactory discussion.

But, having attended very carefully to the elaborate argument we have heard, I cannot say that, on the first point, I entertain a doubt. Under any circumstances, I should have much hesitation in differing from the learned judges of the courts of first instance, who have habitually to deal with practice questions. But I do not see sufficient ground for disputing the perfect correctness of their unanimous decision.

As to the cases in courts of law (in the courts of equity we have had no reference to analogous cases) I do not think that they have any real bearing on that before us. Amongst those cases, when I was familiar with them at the bar, there could hardly have been one, within ordinary experience, in which the Statute of Limitations could have been effectually raised upon demurrer. The immateriality of the statement of time and the use of the *videlicet* made its application generally impossible, and necessitated the raising of the defence by plea; and, although my noble and learned friend was right in saying that a case could be imagined in which, from the narrative of the facts, you might properly infer that there had been such a condition of things as would raise that defence, yet such a case scarcely ever occurred or could occur. It is also to be observed, as was mentioned by my noble and learned friend on the woolsack, that, at law, the pleading of the statute, in order to show the suspension of liability, was a matter of discretion and of choice. It was quite a different thing from pleading it, with reference to real property, where it would operate as a complete transfer of title from one person to another, and as an absolute extinction of a right.

Then, my Lords, we have been pressed very much upon the ground of surprise. It has been urged, that an improper advantage may have been taken of the general mode of raising the question by demurrer, and that the court ought not to have permitted this. As I have intimated, if I [67] thought such advantage *had been taken, or could have been taken, I should readily concur in any amendment which might accomplish full justice between the parties. But, in the first place, it is to be observed that what has been done in this case was strictly in accordance with the practice as established under the Judicature Act. The

counsel for the appellant referred to the 3d rule under Order XXVIII, but the 2d rule says this: "A demurrer shall state specifically whether it is to the whole or to a part, and if so, to what part, of the pleading of the opposite party. It shall state some ground in law for the demurrer, but the party demurring shall not, on the argument of the demurrer, be limited to the ground so stated." We are all, I take it, quite aware that that is a restatement of the practice as it prevailed up to the time of the passing of the act.

The pleader for the respondent specified one ground of demurrer, and added that there were others which would be relied upon at the bar. The one ground, with reference to the suffering of a recovery, has failed the defendant: but the others remain, and one of them is that upon which the courts below have unanimously acted.

That being the state of the law, my Lords, let us see whether, as a matter of fact, there was any surprise in this case. In my opinion, there was none. Anybody who reads the claim will see that it was elaborately and carefully drawn, with a view to the very point on which the respondent has succeeded: and no one of common sense and legal experience could have failed to expect, from the statement of such facts as are presented upon the face of it, that the defence of the statute would be raised. Those facts were sufficient to found that defence, and the raising of it must have been, and undoubtedly was, anticipated.

The learned counsel who settled the statement of claim properly acted on the anticipation, and relied on such grounds as he could suggest to encounter the defendant's case, by averring ignorance of the rights of the plaintiff and those under whom he derived, and the existence of an express trust; and nothing farther has been urged by the appellant in the courts below, or at the bar of your Lordships' House. The question was asked, whether any additional reply to the respondent's contention could be offered, which might support those already open on the pleadings as they stand? But we were not informed of the existence [68 of any, save, indeed, that one of the learned counsel threw out, hypothetically, that one of the parties through whom the title had devolved might have been abroad for a considerable number of years.

And then, my Lords, if there had been,—as we have no reason to suppose,—any additional facts which could have helped the plaintiff, we are entitled to ask,—“Did he apply to the court below for leave to amend?” It was competent to that court fully to protect him, and to say that, having

been taken by surprise on the argument of the demurrer, he should suffer no injustice from the effect of that surprise. And we cannot doubt that, if a reasonable case had been made upon affidavit, or otherwise, the plaintiff would have been allowed to amend his claim so as to put forward anything which might avail for his protection. But no such case was made; there was no application for liberty to amend: and, in my opinion, there is no ground for complaint as to any surprise which could have wrought the least injustice.

My Lords, having said so much on the matter of practice and the conduct of the case, I need add little as to the substantial defence of the respondent, and the mode in which the plaintiff meets it. They have been already dealt with, very clearly and satisfactorily. The case really resolves itself into a single point on the one side and a single point on the other. The demurrer raised a question with reference to the recovery. But that, for reasons which I need not detail, need not be considered now. The one point of the respondent is rested on the operation of the Statute of Limitations, and the answer of the appellant is that there was an express trust preventing its operation. If there was not such a trust the statute plainly bars the plaintiff's claim; and in my judgment there was not. The word "trust" is used by the testator, but the mere use of that word does not make a trust in any legal or equitable sense. For that purpose, as the Lord Chancellor has said, you must have a trustee; you must have a *cestui que trust*; you must have some fiduciary relation. But there is nothing of that sort here. There is an expression of "special trust and confidence" that the son of the testator will not do a certain thing. There is the intimation of a hope that that thing may not be done. There is, if you please, a mandate not to do it, but [69] there is no more. There is no creation of a fiduciary relation between the devisee and anybody else; and I cannot see that any one can properly be regarded as a *cestui que trust*, although if the confidence of the testator had been justified in the event, as it was not, the estate tail would have been maintained according to his wish, and persons undesignated, and then unborn, would have had the benefit of it.

The provision on which the appellant relies, in my opinion, created no trust available to him: and if it had aimed at that object, and, by words sufficient to create it in other circumstances, the purpose of the trust would have been to do that which the law says shall not be done. The testator

gives, in the first instance, an estate tail. To that estate tail, when given, certain incidents are attached, and it is not competent for a man who has created such an estate to take away those incidents. One of them is, that the person to whom the estate tail is given shall have certain powers operating with certain consequences, and you cannot, in defeasance of the estate, take away these powers, or forbid their exercise. Even if there had been a trust, as the appellant alleges, it would be tainted with illegality by the purpose of the testator to nullify the action of the law, and could not have been made legally available to prevent the bar of the statute. The matter is very clearly put by one of the learned judges in the court below (Lord Justice James) in this way: "Now, if there is one thing that has been settled beyond all question in the real property law of this country, it is that no condition, no restriction, no prohibition, nothing, can prevent a tenant in tail from suffering a common recovery with all the consequences of that common recovery; and it appears to me to be perfectly immaterial whether the conveyancer uses one form of words or another." I am quite of that opinion, and therefore, my Lords, upon the substance of the case, as well as upon the matter of practice, I entirely concur with the Lord Chancellor, and think that this appeal should be dismissed.

Order appealed against affirmed; and appeal dismissed, with costs.

Lords' Journals, 27th November, 1878.

Solicitors for appellant: *Guscotte, Wadham & Daw.*

Solicitor for respondent: *Charles Frederick Hore.*

[4 Appeal Cases, 70.]

H.L. (E.), November 27, 28, 1878.

[HOUSE OF LORDS.]

70] *EBENEZER SWINTON, *Appellant*; and REBECCA BAILEY and Others, *Respondents* (¹).*Will—Revocation of "Clause" in a Will.*

J. E. made a will in which he devised his house, lands, and tenements to his mother, "Elizabeth E., her heirs and assigns, forever;" he afterwards struck his pen through the words, "her heirs and assigns forever":

Held, that this was, under the 6th section of the Statute of Frauds (29 Car. 2, c. 3), a valid revocation, by obliteration, of a clause in his will; the mother took only an estate for life.

The 6th section of the statute was satisfied by this act of obliteration of the words in question, which amounted to an actual revocation, and not a mere alteration.

The word "clause" in the first portion of the section may properly be read "part."

Per LORD PENZANCE: "Devise" in the statute means a disposition of lands, in writing, and when the statute says the testator may revoke any "clause thereof" it means any intelligible portion of the devise, whether the effect is to increase the beneficial interest of the taker, or the reverse.

THIS was an appeal against a decision of the Court of Appeal, which had reversed a previous judgment of the Exchequer Division.

On the 16th of November, 1826, one Joseph Ely (or Eley), of the county of Lincoln, made his will, which recited that he was seised in fee simple of certain land in the parish of Kyme in that county, and that he was desirous in case of his death to make a provision for his mother, Elizabeth Ely, and he gave the said lands, &c., to his mother "to hold unto her, the said Elizabeth Ely, her heirs and assigns forever." He bequeathed to her also his personal property, and made her his executrix. The will was attested by three witnesses, and the attestation clause formally noticed two interlineations—the word "simple" after the word "fee," and the word "other" in the clause revoking all *other* wills. There was, however, an obliteration which the attestation clause did not notice. In the body of the will the following words in the gift to the mother "Ely, her heirs and assigns for-
71] ever," had been struck through *with a pen, but the obliteration being more extensive than was intended, the word "Ely" had been re-introduced, and the gift read thus, "to hold to my said mother Elizabeth Ely," the other words continuing obliterated. The testator died in April, 1836, and his mother proved the will. There was no direct evi-

(¹) Affirming 16 Eng. R., 552.

dence relating to the making of the obliterations. But when the will was propounded for probate, on the 17th of June, 1836, Elizabeth Ely made an affidavit, stating that on the death of the testator she made search for the will and found it, and observed the erasures, and she swore that the will as then produced was in the same state as when she found it. Probate was granted to her, and she entered into possession of the property. On the 14th of December, 1853, she made a will devising all her real estate whatsoever and wheresoever to her nephew Jacob Swinton (the father of the appellant) in fee simple. Elizabeth Ely died on the 11th of October, 1859, and on the 14th of November, 1859, the respondents (claiming as co-heiresses-at-law of Joseph Ely) brought an action of ejectment against Jacob Swinton to recover possession of the premises. He at first defended the action, but then withdrew, and the plaintiffs in the action had possession delivered to them. On the 1st of February, 1875, the present appellant, as the heir-at-law of the devisee Jacob Swinton, brought ejectment against the present respondents to recover possession. The cause was tried on the 17th of March, 1875, before Mr. Justice Brett without a jury. A verdict was entered for the now respondents, but leave was reserved to the appellant to move to enter it for him. A rule was accordingly obtained, and on the 18th of November, 1875, judgment in the Exchequer was delivered in favor of the appellant. The case was taken to the Court of Appeal, and on the 2d of February, 1876, that judgment was reversed⁽¹⁾. This appeal was then brought. In consequence of proceedings in the court below, it was here taken as established that the alterations and erasures had been made by the testator himself.

Mr. *Benjamin*, Q.C., and Mr. *T. R. Bennett* (Mr. *Biale* was with them), for the appellant: The question here depends on the construction to be put on the *6th sec- [72 tion of the Statute of Frauds⁽²⁾], and that question is whether what had been done could be said to be a revocation, by obliteration, of a "devise" in a will, or of a "clause" of a de-

(1) 1 Ex. D., 110; 16 Eng. R., 552.

(2) 29 Car. 2, c. 3, s. 6: "No devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall at any time after, &c., be revocable otherwise than by some other will or codicil in writing, declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his direction and consent; but all devises and bequests of

lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator or by his directions in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses declaring the same, any former law or usage to the contrary notwithstanding."

wise. It is submitted that there was no such revocation. The statute meant to insure accuracy in all that was done with regard to wills, and therefore required them to be executed in a particular manner, and, if an alteration was to be made in their provisions, required that the alteration should be made with the same care and formalities that had been observed with regard to the execution of the will itself. If a man determined to revoke his will, he might do so in any one of the ways described in the statute, by cancelling the will, by tearing it up, or by obliterating a devise in it, or even a clause in any devise. Obliteration was a clear and intelligible act as applied to a devise. But nothing that had been done here came within any one of the descriptions in the statute. The words in the section were precise, a "devise" or a "clause" of a devise. Now here the devise had not been revoked, the devise to the testator's mother remained, as it had been originally made. Then had a clause of that devise been revoked? Certainly not. The words obliterated did not form a clause of the devise, but were only qualifying words attached to it, showing the nature of the estate she was to have in the land devised. If they effected any purpose at all, they only effected an alteration in the quality of the thing devised, and then they required to be formally attested in the way in which the will itself had been attested. Not being so attested, they had no effect whatever, and the will remained as before. The statute did not allow the interest of the devisee to be increased except by an alteration of the will properly attested. Nor did it allow the interest to be diminished except the alteration was attested in the 73] same manner. In the court *below, the importance of the technical and precise word "clause" had been disregarded, and the vague and indefinite word "part" had been put as its equivalent. But so to construe the clause was to defeat the very object of the statute, which allowed the obliteration of a devise or a clause of a devise, but did not allow the alteration of it except as attended with certain specified formalities. If a man devised Blackacre and Whiteacre to A., and then obliterated the devise of Whiteacre, there would be a revocation as to Whiteacre, but the devise to Blackacre would remain as before, for the two devises were distinct things, and each was complete in itself. But as to Whiteacre, that would be the obliteration of a "clause" of the original devise, and so would satisfy the words of the statute. The obliteration would be complete in itself, it would be so far a revocation; but an alteration as to the quality of the thing devised would not be a revoca-

tion, and would not fall within the words of the statute. In *Locke v. James* (¹) the testator gave an estate charged with £800 payable to his daughter. He afterwards altered that sum to £200, and added a written declaration that the annuity was to be £200. That was an alteration of the thing devised, a substitution of one thing for another, and not being properly attested was held to be ineffectual. *Ex parte Ilchester* (²) had recognized the same principle, and it was applied in *Winsor v. Pratt* (³). In *Short v. Smith* (⁴) the intention of the testator was not to revoke a devise, but to change the trustees, and Lord Ellenborough said (⁵) that it would be unreasonable to construe such a purpose as a revocation of the will itself, but it was a complete revocation as to the trustees. So in *Larkins v. Larkins* (⁶) the devise was to three trustees—the devise to one of them had been obliterated—that was not a mere alteration of the will; it was a clear revocation of the devise to the one trustee; it was complete in itself, and so was within the words of the statute. Had it been, as it was here, a mere alteration of the interest given, being unattested, it would have been ineffectual.

Mr. *Wills*, Q.C., and Mr. *Mellor*, Q.C. (Mr. *Dunning* was with them), for the respondents: The obliteration here was, under the statute, a declaration of *the intention of [74 the testator to revoke the gift of a fee simple estate to his mother. Suppose there had been, first, a devise to Elizabeth Ely—and then the words—“and after her decease to her heirs and assigns forever.” The appellant could hardly have denied that two devises would have been made. If so, then the obliteration of the latter words must have amounted to the revocation of a devise, or a clause in a devise. It was the same here. It was not a mere alteration qualifying the gift, but a real and substantial revocation of a devise of a fee simple estate—an estate equal to that which he recited himself to possess. He had at first given such an estate; he changed his intention, and he revoked the gift. He revoked it by obliteration, which he could do in accordance with the very words of the statute: Jarman on Wills (⁷). Here words were struck out; there was no mere alteration, but a positive revocation by obliterating that which had been given, and the whole will showed that this had been the intention of the testator.

Mr. *Benjamin* replied.

(¹) 11 M. & W., 901.

(²) 7 Ves., 348.

(³) 2 B. & B., 650.

(⁴) 4 East, 419.

(⁵) 4 East, 429.

(⁶) 3 B. & P., 16-109.

(⁷) Vol. i, pp. 126, 132.

THE LORD CHANCELLOR (Earl Cairns): My Lords, this is the case of a will fifty years old, the will having been made on the 15th of November, 1826. The question is important, no doubt, to the parties in the present case, but it is not of any very extended importance with reference to other wills.

The will is that of a testator of the name of Joseph Ely, who appears to have been resident in the county of Lincoln. As the will originally stood it ran thus: [His Lordship here read the words of the devise.]

Subsequently (as it must now be taken), to the execution of this will, an obliteration was made in it; and it must also be taken, for the purpose of the present appeal, that that was an obliteration made by the testator himself. The obliterations consisted in this: In the devise of the real estate, after the word "Elizabeth" the testator struck out "Ely" ("Ely" evidently having been struck out by mistake, for he restored it; but that makes no difference); and he also struck out the words "her heirs and assigns forever." In the bequest of personalty also, after "Elizabeth Ely," 75] the words "her executors, administrators, and assigns absolutely," are struck out. I refer to that, because I think it not unimportant in reference to the first observation which arises on the matter.

Now, my Lords, I think you cannot for one moment doubt that, putting aside all legislation upon the subject, looking to the character of the obliteration which was here made, and to the fact (which must be taken to be admitted) that it was done by the testator, this was an alteration made deliberately with a set purpose, having reference both to the real and to the personal estate, and operating or being intended to operate in the same way with regard to both. I do not stop to consider whether it had the same operation upon the personalty as it had upon the realty; probably it had not. But it is obvious that the person who made the obliteration desired to remove, in the one case and in the other, the limitation of the words which had been super-added to the name "Elizabeth Ely," the words with regard to the real estate being "her heirs and assigns forever," and with regard to the personalty, "her executors, administrators, and assigns absolutely." That it was done therefore, putting aside the question of statutory enactment, *animo revocandi*, there cannot, I think, be any doubt whatever.

That, my Lords, being the state of the facts of the case, what is the legislation which it is necessary for your Lordships to look at upon the subject? Was this obliteration

effectual with regard to the real estate to alter the devise, so that whereas Elizabeth Ely, under the will as it originally stood would have an estate in fee simple absolutely, under the will as obliterated she would have only an estate for life! Now, my Lords, the statute which has to be looked to with reference to that question is the Statute of Frauds. The 6th section of the Statute of Frauds consists of two parts, and I will, in the first instance, read the first part of it: [His Lordship read it.] That is the first part of the section. The second part is put in apposition to the first, and, as I took the liberty of suggesting during the argument, it seems to me to be inserted for the purpose of constituting an equilibrium between the two portions of the enactment. It runs thus: [His Lordship read it.]

My Lords, I think that, in reality, your Lordships need apply your attention to no more than the first half of the section, because it must be obvious that the object of the Legislature was *in the second part, merely to declare [76 affirmatively the consequence which resulted from the first part. The reference to the first part of the section, by the use, in the second part, of the words "in manner aforesaid," shows that it was not intended by the second part to cut down whatever might be the operation of the first. Now the first part is expressed negatively, but involved in it there is really an affirmative enactment. The Statute of Frauds had provided that there should be no will, devising lands validly, unless it was executed and attested in a particular way; but, then, a will being valid under the first part of the statute, there is, in this section, a provision as to revocation; and I take the first part of the 6th section to enact, in substance, this: "That a devise in writing of lands, and any clause thereof, shall be revocable by burning, cancelling, tearing, or obliterating the same by the testator himself," that is, by burning, cancelling, tearing, or obliterating the devise, or any clause thereof. And inasmuch as you have the words "burning" and "cancelling," which apply to a material object, you obtain from that the obvious proof that "devise" must mean the will, the written paper executed in the manner provided by the statute.

The enactment therefore is that the will may be revoked, and any clause in the will may be revoked, by burning, cancelling, tearing, or obliterating the same, or by another writing executed in the manner provided by the statute. Those are the two ways in which a revocation may take place. Of course, from the very nature of things, those two ways are not coextensive. You will of course be able, by

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means of a fresh writing, to produce results much more extensive than you can produce by cancelling or obliterating; but where you can produce results which are intelligible by cancelling or obliterating, the statute allows you to do it; where you cannot attain the end and object which you have in view by cancelling or obliterating, you must resort to the larger and higher means of making another writing. Of course you may by the other writing produce every result that you can produce by cancelling or obliterating; but it does not follow that by cancelling or obliterating you can produce every result that you can produce by a different writing. The one is a lower form, a lower power of alteration than the other; the other, that is to say, the fresh writing, is the higher power.

77] *That, my Lords, being the scheme of the statute, let me apply it to what is done in the present case. You have here a devise "to Elizabeth Ely, her heirs and assigns, forever," and the testator obliterates the words "her heirs and assigns forever" (I overlook the obliteration of the surname "Ely," as it is immaterial), leaving it to stand a devise to Elizabeth Ely; so that she takes under a devise which does not go beyond her own life, and does not pass to heirs. Now, I ask in the first place, Why is that not within the statute? The statute speaks of any clause in the devise, (which I take to mean in the will), being obliterated by the testator. Are the words "her heirs and assigns forever" not a clause in the will? Why not? It has been suggested that a clause must mean something self-contained, and independent, which when presented on paper would have a meaning by itself, without reference to the context. I do not know any law which says that that is the necessary meaning of the word "clause." When I read an enactment speaking of a devise, that is to say, speaking of a will or any clause in a will, I naturally infer that the word "clause" there means some collocation of words in the will which, when removed out of the will, will leave the rest of the will intelligible. I know no rule which says that the clause itself must be capable of being read as a document by itself if taken alone. The main object is to see if that which you obliterate, which you claim the right to obliterate *de jure* under the statute, is something in the first place which you can obliterate *de facto*; because if the obliteration cannot be made *de facto*, then of course the statute allowing it to be made must be inoperative. Now in this instance, *de facto*, the obliteration can be made. If you strike out the words "her heirs and assigns forever," the

will reads as accurately as the most skilful conveyancer could have worded it. It is complete and perfect in every point.

Then, my Lords, is there any decision which says that the word "clause" must be taken in the limited sense which is assigned to it? I know of none. On the contrary, when I look to the cases which have been referred to, viz., *Larkins v. Larkins* (¹) and *Short v. Smith* (²), it appears to me that in those cases no such meaning *was supposed to be [78 attached or to be attachable to the word "clause."

But, my Lords, I must go farther. I must say that if we are to resort to first principles, and to a technical examination of the character of the words which are here obliterated, as I understand the rule of law it is, that where you have a devise "to A. B. and to his heirs and assigns forever," in the eye of the law that is a devise to A. B., and a devise to his heirs and assigns forever. The law says what the words say,—that you have there a devise to all of those persons. No doubt the law goes on to say that where you have a devise made in that way the ancestor shall have the dispositive power over the whole fee simple; but that is for the reason that you have got the devise to the heirs *ad infinitum*, and the devise cannot have effect given to it in any other way except by treating the words as words of limitation.

Therefore, whether I look to the words of the statute, to what must be the popular meaning (having regard to the statute) of the term "clause," or whether I look to the legal signification of the devise to the heirs of Elizabeth Ely, in the one case, and in the other, I find that there is something which in my judgment can be removed out of the will by obliteration, something which, when obliterated, is revoked, something which the testator, having written, desires to recall, and which he is allowed to recall, and to treat as *pro non scripto* by the process of obliteration provided for by the statute.

My Lords, I therefore am clearly of opinion that the conclusion arrived at by the Court of Appeal in this case was a correct one; that the striking out of the words was justified by the statute; and that the will for the purposes of the devise is to be read as if those words had never been included in it.

I therefore submit to your Lordships that the appeal should be dismissed with costs.

LORD PENZANCE: My Lords, the question in this case turns entirely upon the meaning of the 6th section of the

(¹) 3 B. & P., 16-109.

(²) 4 East, 419.

Statute of Frauds; and I agree with what has just been said, 79] that although the form of the section *is negative yet it contains within it an affirmative proposition. I read the earlier part of the section as being a power conceded to a testator to revoke by cancelling, burning, obliterating, or by another writing properly executed, some portion, at least, of his testamentary disposition. Now, in considering to what extent that power was intended to be given, of course we must have regard to the precise words of the section. It would run in the affirmative form in this way: "Any devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall, at any time after a certain date, be revocable by any other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or by others in his presence and by his directions and consent." Now, to begin with, what is the meaning of the word "devise?" The previous section says that all devises of lands "shall be in writing and signed by the party so devising the same;" and then the 6th section speaks of a "devise in writing of lands, tenements, or hereditaments." I understand by that language that the meaning of the word "devise" is those words reduced into writing which carry with them a disposition of land. "Devise" does not mean the whole will, because there may be many other things in the will that have nothing to do with the devising of lands; but it means that group or collocation of words reduced into writing which operates as a disposition of the testator's lands. Now this section obviously gives a power to revoke any such devise when it has been made, by burning, cancelling, tearing, or obliterating those words, and if the whole of such words were obliterated it would entirely revoke the devise. It farther gives the testator power to revoke the devise "by some other will or codicil in writing" (that is, a complete will or codicil) "or other writing declaring the same." Declaring what? Why, declaring that he had revoked or intended to revoke the devise. So far no one would dispute the construction of the section.

But, my Lords, in addition to that a power is conferred upon the testator to revoke "any clause" of his devise. Now, what is the meaning of those words? My Lords, I have read with great attention and care the decision of the learned judges in the Court of Exchequer, and I find that 80] the learned Lord Chief Baron has *considered that the words, "any clause thereof," that is to say, any clause of the devise, necessarily mean words which contain within

themselves a devise; because he says in express terms, "It is the entire devise and bequest, and must remain in force until cancelled in the manner pointed out by the statute." Then he refers to the cases, and then he says, speaking of the case of *Larkins v. Larkins* (¹), "There, was a complete devise as regarded those two persons, and the alteration operated as to what was struck out; it was a complete revocation as to that particular trustee, and, if so, it comes within the words;" that is to say, he looks upon the case of *Larkins v. Larkins* (¹) in this light: he says that although it was one sentence, yet it really contained within it two complete devises; and, inasmuch as the one name was struck out, it was within this clause of the Statute of Frauds, because the striking out operated as a complete revocation of that entire devise.

Therefore, my Lords, it seems to me that the learned judge whose judgment I have been reading considered that in order to bring a case within this section of the act of Parliament it was necessary that the thing which was struck out, and which was to be revoked, should be a set of words containing a complete devise. But it is obvious that it was not necessary for the learned counsel for the appellant in your Lordships' House to go so far as that, and I do not think he did go so far; he was content to take his stand upon a narrower ground than that; he said that the words "the devise or any clause thereof" must mean some independent sentence, some set of words which have an independent meaning of their own without reference to any context; and he said that if there were such words as those, no doubt a testator might, either by another and properly executed instrument, or by striking his pen through them, get rid of and revoke such words. But, my Lords, I am not aware that there is anything in the statute which justifies that interpretation. When you speak of a devise (meaning thereby what I have already suggested, viz., a set of words carrying with them a disposition of lands) and when you say that it may be revoked in the whole, or that any clause thereof may be revoked, it seems to me to be putting a construction upon the *statute for which there is no warranty in the language, [81 to say that that clause must be an independent sentence. One can easily see, by putting an illustration, that no reasonable object of the Legislature would be effected by such a mode of construction, because, as I think was put in the course of the argument, if in this case, instead of the words "her heirs and assigns forever," the sentence had stopped

(¹) 3 B. & P., 16-109.

at the words "Elizabeth Ely," and then in a subsequent sentence it had run in this way: "And I farther declare that after the death of my said mother the said property shall go to her heirs and assigns forever," you would have had an independent sentence, and there, according to the construction contended for, the devise might have been revoked in that respect without touching the rest of the will. My Lords, it is hardly conceivable that the Legislature intended in this section to make a distinction between two things that are identical in effect, the only difference between them being that in the one case the words which carry the devise, or carry the beneficial intention into effect, are to be found as portions of a larger sentence, whereas in the other case they form an independent sentence. One cannot see any reason for such a mode of legislation. If the intention was to allow a part of a devise to be revoked, there seems to me to be no object in confining the power so to revoke to cases in which the part to be revoked found a place in some independent sentence.

But, my Lords, upon this point of the matter, what say the cases that have been referred to? The two cases that have been cited appear to be the only cases that have arisen; which certainly is a very remarkable circumstance. The Statute of Frauds was not passed yesterday, and the thousands and thousands of wills which, since the passing of the statute, have had words struck out of them, one would have thought would have given rise to this question, if the matter had been doubted. After all, only two cases have been produced to your Lordships' House in which the matter has in any way been raised. In both those cases, as I understand it, it was not doubted that you could get rid of a devise to A. B. by striking out the name A. B. But A. B. is not an independent sentence; it has no meaning in itself; a man's name standing alone without any context has no meaning whatever; it is no part of a testator's express disposition to use the word A. B. *or the words "John Brown." It seems to me, therefore, that those cases, so far as they go, proceed upon the idea that the words "any clause thereof" are not to be confined to cases in which there is some entire independent sentence, which, standing alone and entirely free of context, has a meaning of its own.

But, my Lords, another matter has been touched upon. It is not necessary for the determination of this case, because here the effect of what has been done has not been in any way to increase but on the contrary, to decrease the interest that Elizabeth Ely took. But I confess that I have been

wholly unable to appreciate the arguments which have been used elsewhere, and to some extent in this House, upon the question whether, supposing it to be established that this section of the Statute of Frauds really did give to the testator the power to revoke a portion of a devise,—that is to say, a portion of the words constituting a devise,—that power would cease to exist in a case where the effect of revoking a portion of the words used would be to increase, and not to diminish, the interest of the taker. If that construction is to be put upon the statute, it ought, I think, to have some words from which that inference could be drawn. The statute says, You may revoke a portion of those words constituting the devise if you like; but it says nothing about the effect. Of course it is easy enough to put hundreds of instances in which, as suggested by the Lord Chancellor, there having originally been the words “without impeachment of waste,” a testator strikes his pen through them, and there is then an end of that disposition. Then another case may be put, perhaps rather in the opposite direction; where A. and B. are joint tenants or tenants in common. Whatever may be the restriction or qualification that is struck out, whether it may have a tendency to increase the benefit of the person in question or not, appears to me to be quite immaterial.

My Lords, the opposite idea, I think, is founded upon a view of the word “devise,” which is contrary to what I have suggested to your Lordships as the proper view. As I understand, the idea involved in that argument is this: A devise is a gift; if a testator has made a gift to a man the statute gives him power to revoke the gift or any part of it, and not only to revoke a part of the gift, but to give something more. Looked at in that light one *understands [83 the idea; but I venture to think that the word “devise” is not to be read that way, but that a devise merely means a disposition of lands in words in writing, and that when you say that the testator may revoke “any clause thereof,” that is, may revoke any portion of those words, it means any intelligible portion of those words, whether the effect is to increase the beneficial interest of the taker, or the reverse.

My Lords, I do not think that I need farther discuss this matter. I am entirely of opinion that the judgment of the Court of Appeal gave the right construction to this section. The judgment in the Court of Exchequer appears to me to be far too narrow, because the result of it would be this: that if a man had made a devise in any form, and he wished to alter that devise without doing away with it, he could not

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do it at all except by a fresh will, that fresh will cancelling the first devise; he would have to make a new devise in the amended form that he might desire, and the power of obliterating and cancelling a portion, which was obviously intended by the words of the 6th section of the Statute of Frauds, would really come to nothing, because he could do nothing in the way of revocation except by revoking the whole and making a fresh disposition.

I am therefore of opinion that the judgment of the Court of Appeal ought to be affirmed.

LORD O'HAGAN: My Lords, I am of the same opinion, and I can add little to what has fallen from my noble and learned friends.

The House is relieved by the candor and discretion of the learned counsel for the appellant (Mr. Benjamin) from any trouble about the facts. The case simply raises a question as to the construction of the 6th section of the Statute of Frauds.

Mr. Benjamin's argument attempted to establish something of an antagonism between the two clauses of that section; insisting that one of them regards the revocation and the other the alteration of a will. I do not read it so. Although the phraseology is not perhaps the happiest or the clearest, the meaning of it seems to me plain enough. The first clause is negative and the second is affirmative: but the [84] effect of the second is to emphasise and *make clearer the first. The two clauses have reference to the same subject-matter, and regard the same conditions of fact. They are knit together by the words "in manner aforesaid;" and although the one uses the word "revocable" and the other the word "altered," they appear to me to apply to the same things and to accomplish an identical result.

If that be so, then the question arising will be merely what is the true meaning of the word "clause" as applicable to the whole of the section? Mr. Benjamin would seek to exclude from the second portion of it "any clause thereof," and confine the operation of that phrase to the first; but, in my view, it applies to the whole: and upon the true interpretation of it our decision must depend.

The judgments of the Court of Exchequer appear to me to have gone upon a too narrow view of the meaning of "clause." I cannot attribute to it that which alone would support the appellant's contention. The word has various operations, and is used in various ways. There may be a "clause" of a bill in Parliament, or a "clause" of a chap-

ter, or a "clause" of a paragraph, or a "clause" of a sentence. We must consider it, *secundum subjectam materiam*, and find out what is its reasonable construction when taken with the context.

It seems to me plain that the cases to which we have been referred, and on which my noble and learned friends have observed so fully that I shall not farther allude to them,—chiefly the cases of *Larkins v. Larkins* (') and *Short v. Smith* ('),—ascribed to the word "clause" in this section, and, in my opinion, rightly ascribed to it, a meaning very different from that which was put upon it by the learned judges of the Court of Exchequer. The word "clause" must be considered in connection with the antecedent word "devise;" and we must distinguish between the one and the other. The construction of the Court of Exchequer if maintained, would seem to give to the word "clause" all the meaning that can be attributed to the word "devise." It would point to a sentence, completed and self-contained. But is that the necessary effect of the section? The words are, "No devise in writing of lands nor any clause *thereof*," &c. Now, supposing that there is a single devise of a single piece of land, without more, is it to be *said that be- [85
cause you cannot make out a complete sentence, constituting in itself a separate devise, within that devise, which in itself is integral, the section is not to have any application? I know no rule of law or canon of construction which would compel us to such a conclusion, and all the authorities appear to me to go directly the other way.

Therefore, it seems to me that this narrow interpretation of the word "clause" is not to be maintained, that the view taken by the learned judges in the Court of Appeal is the right view, and that the word should be interpreted as if it were "part."

I do not so interpret it with reference to later legislation, or because in a subsequent statute there has been a wider and perhaps a better mode of phraseology employed; but looking only to the act before us, it seems to me not unreasonable to say that a "clause" of a "devise," which must be a smaller thing comprised within a larger, is a "part" of a devise; and, if it be a part, there is an end of the controversy. If the word "part" had been substituted in the statute for the word "clause," I agree with the learned counsel that no such controversy would ever have arisen.

I need scarcely say a word upon the other portion of the

(') 3 B. & P., 16-109.

(') 4 East, 419.

argument, which has been ingeniously and earnestly pressed upon your Lordships by the learned counsel for the appellant. They insisted on the distinction between revocation and alteration, with the apparent result that such an alteration as we are dealing with, could not be accomplished save by the addition of a codicil or the making of a new will. I am inclined to agree with my noble and learned friend who last addressed the House, that such a result comes very nearly to a *reductio ad absurdum*. A revocation surely may be either a revocation of a part or a revocation of the whole; and a partial revocation exists in this particular case. Suppose that, instead of an obliteration, we had a codicil or a new will, reciting that in a former instrument the testator had given to his mother and her heirs some portion of his property, but that he was minded for good reasons to alter his devise, and revoke a part of it, taking away the heritable estate but affirming a gift for life;—the revocation and affirmation would have been complete and effectual. And has not precisely the same thing been done by this obliteration? It has left the life estate to the mother, *and has taken away from it inheritance by her heirs and assigns. The subject-matter of the devise is perfectly divisible; what has been taken away does not affect the limited interest in that which remains. No new provision is necessary to convey that integral interest: or to extinguish the larger estate which the testator, by his obliteration, has as clearly declared his intention to destroy, as he could have indicated by any form of words.

We are under no necessity of troubling ourselves about the effect of an obliteration involving an increase of the interest devised. There is no such increase here. One thing is taken away. Another thing remains. There is no addition requiring any declaration of will or purpose which the mere obliteration does not necessarily demonstrate: and our decision is not embarrassed by conditions which might be material in another state of facts.

Upon the whole I think this appeal must be dismissed, and the decree affirmed with costs.

THE LORD CHANCELLOR: My Lords, I wish to say, in order to prevent misunderstanding, that the observations which I made to your Lordships were made only with reference to an obliteration which is a revocation in the proper sense of the term, that is to say, a cutting down or a taking away of something previously given. It is of course possible to conceive the case of an obliteration which might have

the effect of enlarging that which before was given. Until a case of that kind arises, if it ever should arise, I wish to keep my judgment upon it altogether suspended.

Decree appealed against affirmed; and appeal dismissed, with costs.

Lords' Journals, 28th November, 1878.

Solicitor for the appellant: *C. M. Elborough.*

Solicitors for the respondent: *H. B. Clarke & Son.*

See 21 Eng. R., 635 note.

Under the provisions of the Revised Statutes (2 R. S., 64, § 42), prohibiting the revocation or alteration of a will save in the manner specified in said provision, an obliteration by the testator of a clause in his will, although with the purpose of revoking the same, is not effectual for that purpose. No obliteration can be effective, unless it altogether destroys the whole will: *Lovell v. Quitman*, 88 N. Y., 377, affirming 25 Hun, 537, overruling *McPherson v. Clark*, 3 Bradf., 96.

If, in order to correct the spelling in his holographic will and make it more legible, the testator has it copied and attempts to execute the copy, which proves defective from want of defective attestation, the original, although destroyed by him, should be admitted to probate: *Wilburn v. Shell*, 59 Miss., 205.

A testator executed two wills, with an interval of some years between them. The first will still existed at his death. The second will had been destroyed. The execution and date of the second will were proved by the evidence of both the attesting witnesses. One of such witnesses proved, that during the testator's lifetime he found the second will torn to pieces in the testator's waste-paper basket; that he put the pieces together and read the will, and afterwards destroyed it; that such will disposed of the whole of the testator's property, but contained no clause of revocation of former wills. There was no other evidence of the contents of the second will. Held, that the execution and contents of the second will were sufficiently proved for the purpose of showing that the first will had been revoked by it: *Macahay v. Madden*, 5 Wyatt, Webb & A'Beckett (Prob. and Mat.), 38.

A will is not revived by the destruction of a subsequent will, when the latter or any intermediate will had contained a clause revoking all former wills: *Scott v. Fink*, 45 Mich., 241.

Under a statute that no will shall be revoked, unless the testator, or some one in his presence, directed by him, "with intent to revoke shall destroy or mutilate the same," the marking out by a testator of his signature by pencil lines, coupled with the required intent, constitutes a revocation: *Woodfill v. Patton*, 76 Ind., 575, 2 Amer. Prob. Rep., 200, 208 note.

The cancellation by the testator of his own name and those of the witnesses to a testamentary writing, without obliterating them, is not such a destruction of the will as is required by the Wills Act; and a memorandum at the foot of the instrument, signed by the witnesses, but not by the testator, stating that it had been revoked by the testator in their presence, will not operate as a revocation: *Matter of Barrett's Will*, 2 Vict. L. R. (Prob. and Mat.), 98.

Where a testator had obliterated and altered portions of a codicil, the court, upon application for probate, directed the codicil to be examined by two inspectors, and, upon their report of its entire legibility, granted probate of it as set out by them: *Matter of Reddell's Will*, 6 Vict. L. R. (Prob. and Mat.), 5.

In 1879, after the decease of W., who had made his will in 1863, there was found among his papers a portion of it torn off, and containing (besides the date as of 1863, and the signature duly attested) only the words "and appoint the said William Domville Handcock to be executor of this my will," and at the foot, in the handwriting of the deceased, "as some circumstances

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have changed." Held, that W. must be taken to have revoked his will, and accordingly (affirming the decision below) that the mutilated document should not be admitted to probate: *Matter of White's Will*, 3 L. R. (Ireland), 413.

The destruction of a will by a person not possessing testamentary capacity, is not a revocation of it. There must be *animus revocandi*, and such person does not and cannot possess an intention of revocation any more than an insane man can.

And where the destruction of a will by the testator is the effect of the exercise upon his mind of undue influence, it is not a revocation of the will: *Rich v. Gilkey*, 78 Maine, 595.

Where a will was found among the papers of deceased with the signature cut out, notice of application for administration was required to be served on the executor and the beneficiaries under the will: *Matter of King's Will*, 7 Vict. L. R. (Prob. and Mat.), 26.

Parol declarations of the testator cannot be admitted to control the construction of a will; and declarations of the testator as to his intention to make a particular bequest, or that he has made such a bequest, cannot be admitted for that purpose, except when the terms used in the will apply indifferently, without ambiguity, to each of several different subjects or persons; when evidence may be received as to which of the subjects or persons so described was intended by the testator: *French v. French*, 14 W. Va., 458.

It is admissible to prove, in a contest as to the genuineness of a will offered for probate, that the testator, before and at the date of the alleged will, expressed unfriendly feelings towards the principal legatees under the will as evidence of a distinct, independent, collateral fact, which would in some degree tend to prove the issue before the court. Held, in such contest, that it was error to admit evidence of an attempt by the alleged testator to make a will subsequent to the date of the alleged will: *Johnson v. Brown*, 51 Texas, 65.

Where, for the purpose of showing a settled dislike on the part of a testator towards a son, to whom, by such a will, he had given the whole of his property, declarations of the testator's

had been admitted in evidence to the effect that his son had turned him out of doors and compelled him to sleep in out-buildings, and had refused to assist him in severe weather in taking care of his cattle, he being over ninety years of age; it was held that it might be shown in support of the will these declarations were untrue.

Evidence that such declarations had no foundation in fact, would tend to show that they were not in fact made, and that if made, they were not proof of so great a degree of dislike as if they were true: *Canada's Appeal*, 47 Conn., 450.

Declarations of the testator concerning a will may be shown, to establish its contents and the probability or improbability of its destruction by him: *Southworth v. Adams*, 4 Wisc. Leg. News, 347.

The attestation of an instrument of writing imports nothing as to its character or contents. And when the handwriting of a deceased subscribing witness has been proved in order to establish the existence of an instrument, and it is sought to rebut the presumption of due execution arising from his name being on the paper, evidences of the deceased attesting witness must be confined to the circumstances of the execution and attestation of the instrument, and is inadmissible as to its nature or contents: *Bott v. Wood*, 56 Miss., 136.

Mutilation of the will by the testator is sufficient evidence of revocation, and it is doubtful whether his declarations, other than those which accompany the act, are admissible in evidence.

If, in such a case, there is doubt whether the testator or a spoliator mutilated the will, such declarations, though no part of the *res gesta*, are admissible in order to prevent the deceased person's intentions by accident or fraud: *Tucker v. Whitehead*, 59 Miss., 594.

Declarations of testator are not alone sufficient to prove the due execution or the contents of his will. Declarations of the deceased as to the execution or contents of his will are only admissible in corroboration of other evidence, and, when there is no other evidence, his declarations should be rejected.

Where there is no legal evidence that such a will ever existed, as that sought to be established, there can be no evi-

dence of its fraudulent abstraction or suppression.

The propounders presented a writing purporting to be the substance of the will in this case. See in opinion a statement and discussion of the evidence showing its incompetency and insufficiency to establish or prove the due execution, or the contents, or the fraudulent suppression of the alleged will, wherein the court concludes as follows: "As therefore no case was made out of it, the admission of evidence of the declarations of Mercer, on the ground that his will had been fraudulently suppressed, and as there was no legal evidence of its execution or contents to be corroborated by evidence of his declarations, this circuit court should have decided, as matter of law, that the evidence was insufficient, and have directed the jury to find that no part of the writing before them was the will of Felix Mercer, and have affirmed the judgment of the county court," rejecting the writing presented by the propounders: *Mercer v. Mackin*, 14 Bush (Ky.), 434.

On the contest of a will and codicil, when offered for probate, on the ground of want of mental capacity and of undue influence by a second wife, it is error to exclude matters occurring in the testator's family within a year preceding the making of the will, which affords an insight into the private history of the family, and furnishes an understanding of the relations of the testator with his wife, to whom the principal part of the estate was devised, and which also tends to show the means employed by the wife to alienate the affections of the testator from his children by a former wife, and to obtain the control of his property.

While the declarations of a testator are not admissible to show an express revocation of his will, or the fact it was executed under duress, or to prove undue influence, they may nevertheless be proved and used to show his mental condition at the time of the execution of the will, or so near the time that the same state of affairs must have still existed.

Where the probate of a will is resisted on the ground of a want of mental capacity in the testator, and undue influence exercised by his wife to whom the bulk of his property is given, any

evidence is proper which tends to show the testator's mental condition, the annoyances he was subjected to by the continued importunities of his wife, his susceptibility to the influences of those in whose care he was, and his helplessness in their hands, from want of mental vigor induced by long sickness, to resist any influence that might be brought to bear on him: *Reynolds v. Adams*, 90 Ill., 184.

On the question of the competency of a testator or grantor, his admissions and declarations are competent: *Dings v. Bronson*, 14 W. Va., 100.

While the declarations of a testator, either before or after the execution of his will, are as evidence of external facts stated, whether in support or impeachment of the will, mere hearsay, and are inadmissible, yet wherever the mental condition of the testator is a subject of inquiry, his statements and declarations are competent evidence thereof. Therefore, where a will is charged to have been executed through undue influence, and the circumstances surrounding the execution tend to show weakness and debility on the part of the testatrix, and the presence and active assistance of the principal devisees, held, that it is competent to show that for years prior there had been estrangement and ill-will between the testatrix and one of such devisees, and as evidence of such estrangement and ill-will, to introduce her statements and declarations: *Mooney v. Oslen*, 22 Kans., 69.

In an action to contest a will on the ground of undue influence, a wider range of inquiry exists than in ordinary litigation. The contents of the will, the extent of the testator's estate, his family and connections, the terms upon which he stood with them, and the claims of particular individuals, the condition and relative situation of the legatees or devisees named, the situation of the testator himself, and the circumstances under which the will was made, are all proper to be shown: *Mooney v. Oslen*, 22 Kans., 69.

M. L. died in 1860, leaving real estate. There was evidence to show that he had made a will which was never proved, and was lost after his death; but its contents were uncertain. Application by executors of the widow for letters of administration *cum testamento annexo* to his estate refused:

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Matter of Lynch's Will, 1 Vict. L. R. (Prob. and Mat.), 35.

Where it is shown that the will of a testator was in existence unrevoked at the time of his death, and was afterwards lost or destroyed, its contents may be proved by parol, and the will as thus reproduced admitted to probate.

Where it is shown that the testator always had his will in his custody, and after his death it could not be found, the presumption is that he destroyed it *animo revocandi*; but such presumption may be removed by sufficient evidence: Foster's Appeal, 87 Penn. St. R., 67; Southworth v. Adams, 4 Wisc. Leg. News, 348; Mercer v. Mackin, 14 Bush, 434.

Even though the testator gave information that his will would be found in a particular place, if a codicil, but not the will, be there found: Matter of Henty's Will, 4 Vict. L. R. (Prob. and Mat.), 54.

The burthen is on a party setting up a lost will to prove its execution and contents by strong, positive and convincing evidence. As to what circumstances are sufficient: Southworth v. Adams, 4 Wisc. Leg. News, 347; Newell v. Homer, 120 Mass., 280; Matter of Hallet's Will, 4 Vict. L. R., (Prob. and Mat.), 51.

The party seeking to establish a will as lost or destroyed after the testator's death, may do so by circumstances. As to what circumstances are sufficient: Southworth v. Adams, 4 Wisc. Leg. News, 348.

The contents of a will may be proved by the copy, after it is shown to be accurate; and the testator's attempted execution and his preservation of the copy is such evidence that the original, which was complete and not provisional, was his will; that, with his declaration to that effect, the testimony of the copyist, who is disinterested and credible, and corroborating circumstances, it will justify the probate: Wilburn v. Shell, 59 Miss., 205.

Where a will after execution was handed to the solicitor who prepared it, but was lost by him, the court granted probate of its contents as set out, from memory: Matter of Dignan's Will, 6 Vict. L. R. (Prob. and Mat.), 3.

Where one deliberately destroys, or purposely induces another to destroy,

a written instrument of any kind, and the contents thereof subsequently become a matter of judicial inquiry between the spoliator and an innocent party, the latter will not be required to make strict proof of the contents of such instrument in order to establish a right founded upon it. In such case slight evidence will suffice.

So where a will duly executed and attested was destroyed, with the connivance of a part of the heirs of the testator, and no copy appearing to be in existence, in a suit by a devisee not a party to such destruction, it was held, that the latter was only required to show, in general terms, the disposition which the testator made of his property by the instrument, and that it purported to be his will, and was duly attested by the requisite number of witnesses: Anderson v. Irwin, 101 Ills., 411.

The principle of the maxim *omnia presumatur in odium spoliatoris*, as applicable to the destruction or suppression of a written instrument, is that such destruction or suppression raises the presumption that the document, if produced, would militate against the party destroying it, and that his conduct is attributable to this fact. Hence slight evidence of the contents of the instrument in such a case will usually be sufficient; but the maxim referred to should not be carried to the extent of dispensing altogether with the necessity of other evidence.

It is only in reference to the contents of a paper destroyed or withheld, that the maxim *omnia presumatur in odium spoliatoris* can have any application; and where there is express and positive evidence of the contents of such paper, there is no place for presumption or inference, and it is improper to resort to this maxim.

Where, upon an issue *devisavit vel non*, it is sought to establish a will which it is claimed has been destroyed, it is error for the court to give an instruction to the jury in which they are told that "everything may be presumed against the destroyer of the will." The charge is too broad and indefinite: Bott v. Wood, 56 Miss., 136.

A will determines the rights of the parties under it *proprio vigore* from the death of the testator. Its probate is

necessary to fix the right of the executor to execute it, to point out the person authorized to act, and as a basis and prerequisite to letters testamentary, but is not essential to its validity. Rights under it are not lost by failure to probate; and to establish or protect them, the validity of a will may be shown in any court: *Arrington v. McLemore*, 33 Ark., 759.

Where letters of administration have been granted and probate is sought of a will subsequently discovered, notice of the intended application should be given to the administrator; and the advertisement should state that application will be made to revoke the letters of administration: *Smyth's Will*, 1 Vict. L. R. (Prob. and Mat.), 17.

In such case the administration granted upon intestacy should be called in and revoked: *Matter of Minter*, 3 Wy., *Webb & A'Beckett*, Vict. (Prob. and Mat.), 82.

Where a will was proved to have been in existence shortly before the testator's death, and subsequently to his death it could not be found, and there was nothing to show an intention to revoke it but rather circumstances showing a contrary intention, administration was granted, limited in point of time, till the will should be found: *Will of Twigg*, 7 Vict. L. R. (Prob. and Mat.), 59.

Where administration, granted upon concealment of a will, is afterwards revoked upon the discovery of the will, *mesne* acts and sales by the administrator are void, and are not made good by the subsequent refusal of the executor: *Abram v. Conyngham*, *Freem.* (K.B.), 445, 1 Vent., 303, 2 Lev., 182, 2 Mod., 146, T. Jones, 72, 3 Keb., 725, *Wallace's Reporters* (3d ed.), 242-3, (4th ed.), 391-2; *Edwards v. Freeman*, 2 Peere Wms., 435; 1 *Lee's Ecc. Rep.*, 97-8, 172.

See 3 Redf. on Wills, 120 marg. p., chap. 4, § 7; *Bacon's Ab.*, tit. Executors, E, 13.

The property of a deceased person vests in his executor from the time of his death; in an administrator from the time of the grant of letters of administration; and therefore, where A. took out letters of administration under a will by which he was appointed executor, and after notice of a subsequent will sold the goods of the testator;

held, that the rightful executor, in an action of trover, was entitled to recover the full value of the goods sold; and that A. was not entitled, in mitigation of damages, to show that he had administered the assets to that amount: *Wooley v. Clark*, 5 Barn. & Ald., 744.

Letters of administration to a deceased person were, as in case of actual intestacy, granted to A. The defendant made a *bona fide* payment to A., the administrator, on account of a debt due to the deceased. Subsequently a will made by the deceased, and in which no executor was named, having been produced, the letters of administration to A. were, upon citation, revoked, and letters of administration *cum testamento annexo* were granted to B. In an action by B. against the defendant:

Held, that the payment on account to A., the first administrator, was valid, and that B., the second administrator, could recover the balance only: *Maguire v. Denham*, 8 Irish Law Rep., 240.

Where there was a will in which no executor was named and by the Court of Prerogative administration to the deceased, as in case of actual intestacy, was granted to one, and by the same court that administration was afterwards revoked and administration *cum testamento annexo* granted to another: Held, that the first administration was voidable only, and not void; secondly, that the *mesne* acts of the first administrator, if done in due course of administration, were valid; and thirdly, that it lies upon the party impeaching those acts to show that they were not so done: *Bevan v. Lloyd*, 10 Irish Law Rep., 228.

Where an administrator in pursuance of a decree of the Orphan's Court has paid over money to a distributee without notice of a bill of review, he will be protected against loss should the court subsequently open and change the decree: *Stewart's Appeal*, 86 Penn. St. R., 149.

That letters of administration are conclusive when attacked collaterally, if issued by a court having jurisdiction to grant them, see 26 Eng. R., 771 note.

Minnesota: *Pick v. Strong*, 26 Minn., 303.

United States: *Lavin v. Emigrant*, etc., 18 Blatchf., 1.

If letters of administration be granted

upon the estate of a living person by a surrogate having jurisdiction to issue them, payment to such an administrator is valid: *Lavin v. Emigrant, etc.*, 18 Blatchf., 1.

In *Tennessee*, it is held that administration upon the estate of a living person is void: *D'Arusement v. Jones*, 4 Lea (Tenn.), 251.

So in *California*: *Stevenson v. Superior Ct.*, 10 Pac. C. L. J., 479.

So in *Pennsylvania*: *Devlin v. Com.*, 27 Alb. L. J., 212.

The defendants were sureties upon a bond given to the people by one Williams, upon the issuing to him of letters of administration upon the estate of the plaintiff, under the authority of which letters he had taken possession of, and converted to his own use, property of the plaintiff of the value of about \$3,000.

About three months after the letters were issued they were revoked and annulled by the surrogate, and an action was brought by the plaintiff against Williams to compel him to account for the property so received, in which he recovered a judgment for \$1,761 25, besides costs, upon which an execution was afterwards issued and returned unsatisfied. In this action, brought against the defendants to recover the amount of the former judgment, they demurred, on the ground that the plaintiff had not the legal capacity to sue, that there was a defect of parties plaintiff, and that the complaint did not state facts sufficient to constitute a cause of action. Held, that as the provisions of the statute, prescribing what should be done before an action upon the bond could be brought in

the name of the people, could not be complied with by reason of the fact that the person on whose estate the letters were issued was living, and as, for the same reason, the provisions of the statutes providing for the assignment of the bond by the surrogate were inapplicable, the plaintiff, as the party beneficially interested in the controversy, might, without making the people a party, prosecute an action against the defendants, as it was by means of their intervening and becoming sureties upon the bond that Williams obtained the authority to receive and misappropriate the plaintiff's property: *Williams v. Kiernan*, 25 Hun, 355.

The court in its probate jurisdiction will revoke the probate of a revoked will, even though there is such a contract for the making of the will as would be enforced by the court in its equitable jurisdiction against the estate of the deceased. A husband and wife agreed to make mutual wills in each other's favor, and made them. The wife by a subsequent will, which was itself revoked, revoked the former will, but the husband after her death obtained probate of it without opposition. The court made absolute a rule to revoke the probate, and directed the costs of both sides to be paid out of the estate: *Matter of Reynold's Will*, 7 Vict. L. R. (Prob. and Mat.), 57.

Probate of a will can only be granted by the court. Proof may be taken by the clerk or a judge of the court, but subject to confirmation or rejection by the court. Unless there is a confirmation appropriately evidenced by an order to that effect, the will is not probated: *Smith v. Estes*, 72 Mo., 310.

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[HOUSE OF LORDS.]

FIRST APPEAL.

*SIR THOMAS KIRKPATRICK, Bart., *Appellant*; The [96
Rev. RILAND BEDFORD, *Respondent*.

SECOND APPEAL.

CHARLES J. BEDFORD, and Another, *Appellants*; SIR
THOMAS KIRKPATRICK, and Another, *Respondents* (*).

Trust—Settlement—Legacy to Residuary Legatee held good—Intention of Testator.

A testator gave to R. K. £2,000 and to "each of his brothers £1,000," and bequeathed the residue of his estate between Sir T. K. and R. B. Sir T. K. was the eldest brother of R. K., who was the third among eight:

Held, reversing the decision of the court below, that Sir T. K. was entitled to the legacy of £1,000 as one of the brothers of R. K. in addition to half the residue.

Interest on Legacies payable out of Price of Heritable Estate.

Trustees were directed to sell heritable estates as soon after the testator's decease as practicable, and pay certain legacies. After a necessary litigation running over two years, the property was realized. On a question whether interest was payable from the testator's death, in accordance with the general rule in Scotland, or from the date of the sale:

**Held*, reversing the decision of the court below, that interest was due on [97
the legacies from the testator's death.

Legacy Duty—Effect of Marginal Note, "All free of Legacy Duty."

In his holograph will, a testator wrote along the margin opposite to legacies to servants these words, "All free of legacy duty." There was no circumflex or mark to show where they were intended to be read:

Held, reversing the decision of the court below, that all the legacies given in the will, both those to relatives and those to servants, were free of legacy duty.

APPEALS against an interlocutor pronounced by the Court of Session, the 20th of December, 1877, on a special case.

William Sharpe, of Hoddum, died the 18th of December, 1875, possessed of the heritable estates of Hoddum and Knockhill, and others, and personal property of about £10,000. By a trust disposition and settlement, dated the 19th of May, 1870, by which he dealt with the estates as belonging to him in fee, he conveyed them to trustees, to sell and realize as soon after his death as it could conveniently be done, and to apply the residue in the manner to be specified in any writing under his hand.

Subsequently, on the 13th of June, 1870, he executed a separate holograph deed, in which he referred to his trust disposition and settlement; and then on the narrative that

(*) Reversing Court of Session Cases, 4th Series, vol. v, p. 380.

he has been advised by counsel of his right to do so, orders and instructs his trustees, as soon after his decease as they possibly can find to be practicable, to sell and dispose of his whole heritable property. The deed then continued :

That being, I deem, a sufficient instruction to sell, I now proceed to instruct my trustees as to the distribution of the price, viz., the price of the heritage. . . . I hereby order and instruct my said trustees to make payment of all my just debts which may stand against me at the time of my death, also the following legacies :—To my nephew, Charles Bedford, the sum £5,000, and the like sum of £5,000 to his brother, Campbell Bedford : To Roger Kirkpatrick, son of my nephew, Sir Charles Kirkpatrick, deceased, the sum of £2,000, and to each of his brothers the sum of £1,000, the share of any brother predeceasing to go in equal division among the others : Further, to pay to the family, equally among them, share and share alike, of the late George Inglis, the sum of £2,000 : To Robert Menzies, my servant, if in my service at the time of my death, £1,000 : Also to pay to John Dalzell, if in my service at the time of my death, as a faithful servant, the sum of £300 ; and to William Jackson, if in my service, the sum of £200 at the time of my death ; also to pay to David Gillum, once my servant, and dismissed from my service, as I thought, harshly, while a deserving lad, the sum of £50 sterling ; all which legacies I desire my said trustees to pay [98] over from *the first and readiest of my salable estate : And finally, so far as I see at the present moment, I desire and require my said trustees to pay over the residue of my whole estate, excepting as before excepted and bequeathed, to Sir Thomas Kirkpatrick, Baronet, presently abroad, and the Reverend Riland Bedford, my nephews, equally *among* them, or rather *between* them, share and share alike.

W.L.—All free of Legacy Duty.—SHARPE.

By a codicil dated the 27th of December, 1873, Mr. Sharpe desired his trustees to pay £200 to John Jackson, his house servant, “and that free of legacy duty.” And by a codicil dated two days later he directed his trustees to purchase an annuity of £300 per annum for the wife of Charles Bedford.

On the death of William Sharpe the trustees were confirmed his executors on the 10th of March, 1876. But the remaining trustee of General Sharpe, brother to the testator, and in whom the estate of Hoddum was feudally vested, refused without judicial authority to hand over the estates. William Sharpe’s trustees therefore found it necessary on the 31st of March, 1876, to raise an action in the Court of Session, concluding for declarator that they had a preferable right to the estates Hoddum and Knockhill. This litigation continued until the 10th of March, 1877, when the trustee of General Sharpe was ordered to convey them to William Sharpe’s trustees (‘). This was done in August, and the estates were then sold for £240,895, with entry at Martinmas, 1877. Besides the personal estate of £10,701, 13s. 4d. the trustees received to the date of the sale about £10,000 as rent.

Sir Charles Kirkpatrick, mentioned in the deed of instructions, left eight sons, who still survive, of whom Sir Thomas

(‘) Scotch Cases, 4th Series, vol. iv, p. 641.

is the eldest and Roger Kirkpatrick (also mentioned) is the *third*.

In these circumstances Sir Thomas Kirkpatrick, the appellant in the first appeal, maintained that he was entitled under the provisions of the holograph deed to a legacy of £1,000 (as being one of Roger Kirkpatrick's brothers) over and above his half of the residue. The trustees and the respondent, the Rev. Riland Bedford, to whom the other half of the residue is given, contended that Sir Thomas was not entitled to the legacy of £1,000, his right upon a sound construction of the said deed being limited to one-half of the residue.

It was further maintained by the legatees (the appellants in *the second appeal) that interest was payable on the [99 legacies from the date of William Sharpe's death; and also that the legacies should be paid free of legacy duty, in terms of the marginal note, "All free of legacy duty." In reference to these clauses the two residuary legatees (the respondents in the second appeal) contended that no interest was due upon the legacies, except from Martinmas, 1877, the date of the sale, there having been no undue delay in the realization of the trust estate, and payment being impossible until the estate was realized; and that the legacies were not payable free of legacy duty, the marginal addition having reference only to the legacies opposite which it was written, namely, those to the servants.

In the special case presented to the Court of Session the trustees were first parties, Sir Thomas Kirkpatrick second party, the Rev. Riland Kirkpatrick third party, and the other legatees under the deed of instructions fourth parties.

On the 20th of December, 1877, the Second Division found (Lord Gifford dissenting from the conclusion arrived at on the first question) that:

(1) Sir Thomas Kirkpatrick is not entitled, as one of Roger Kirkpatrick's brothers, to receive payment of a legacy of £1,000 under the provisions of William Sharpe's instructions to his testamentary trustees, in addition to the share of residue bequeathed to him. (2) That the first parties are bound to pay to all the legatees interest upon their respective legacies from the term of Martinmas last, at the rate of 5 per cent. per annum. (3) That the marginal note or addition by the said William Sharpe on the third page of his instructions to his trustees, dated 13th June, 1870, relative to his trust disposition and settlement, as to payment of legacy duty on the legacies bequeathed by him, applies only to the legacies to his servants and others on the said third page, beginning with the legacy to the family of the late George Inglis. Allow the expenses incurred by all the parties out of the trust estate⁽¹⁾.

Against part *first* of this decision Sir Thomas Kirkpatrick (second party) appealed; and against parts *two* and *three*

⁽¹⁾ Scotch Cases, 4th Series, vol. v, p. 380.

the legatees (fourth parties) appealed to the House; and the two appeals were directed to be heard together.

Mr. *Graham Hastings*, Q.C., Mr. *Dawney*, and Mr. A. *Low* (of the Scotch bar), appeared for Sir Thomas Kirkpatrick, but, having merely stated the facts, were stopped.

100] *Mr. *E. E. Kay*, Q.C., and Mr. *Gillespie* (of the Scotch bar), maintained, for the Rev. Riland Bedford, that it was not the intention of the testator that Sir Thomas Kirkpatrick should receive any legacy as one of Roger's brothers in addition to his share of the residue. The residuary legatees had already received £103,000 each, it could not be assumed to have been the intention of Mr. Sharpe to increase the appellant's share by so small a bequest as £500.

This also met the argument of the appellants that the testator intended to give him a legacy of £1,000.

[They cited *Russell v. Dickson* (') and *Horsburgh v. Horsburgh* (').]

Mr. *Southgate*, Q.C., and Mr. *Readman* (of the Scotch bar), maintained, for the appellants in the second appeal, that interest was due from the death of the testator, that being the general rule in Scotland. If the decision of the court below was right the pecuniary legatees would get no part. as interest, of the £10,000 paid as rent during the two years that the property was unsold. In England general legacies bear interest, although payment be impracticable: *Wood v. Penoyre* ('). And if the legacy is specific its proceeds belong to the legatee from the testator's death. *Lord v. Lord* (') was a case in which the testatrix gave the property when the litigation which was then proceeding should be ended. The payment of the legacies given here was not postponed. A direction to sell operated as a conversion of the beneficial estate from heritable to movable; and the conversion takes effect from the time the direction was binding on the trustees, without regard to its actual execution: see *Angus v. Angus* ('); *Erskine* ('); *Advocate-General v. Blackburn's Trustees* ('); and *Somerville's Trustees* ('). If the property was considered as money at the testator's death, then the legacies vested *a morte testatoris*, and interest was due on them from that date: *Elliot v. Bowhill* ('). In *Smith's Trustees* ('), although vesting was postponed,

(') 4 H. L. C., at p. 304.

(') Nicolson's ed., vol. i, p. 293 (Ed.

Jur., 118. (') Jan. 12, 1847; 9 D., 329; 19 Scot. note).

(') 1847; 10 D., 166.

(') 13 Ves., 333-4-5.

(') 1859; 21 D., 1148.

(') Law. Rep., 2 Ch. App., 782.

(') 1873; 11 Macph., 735.

(') 1825; 4 S., 279; N. E., 283-6.

(') 1867; 6 Macph., 83.

*each legatee was held entitled to his share at the [101] date of testator's death, with interest and fruits which had subsequently accrued thereon: see also *Dunbar v. Societies of Scripture Readers* (*Duff's Trustees*) (¹); *Campbell v. Reid* (²) *Ogilvie v. Boswell* (³).

[They also cited in their printed case *Fletcher v. Ashburner* (⁴); *Dickson's Tutors v. Scott* (⁵); *Macpherson v. Tytler* (⁶); *Arbuthnot v. Arbuthnot* (⁷); *Sime v. Balfour* (⁸); *Glasgow's Trustees* (⁹); *Macalister Trustees* (¹⁰); *Bristow v. Bristow* (¹¹); *Smith v. Barlas* (¹²).]

On the Marginal Note :—The words "All free of legacy duty" referred to all the legacies in the will. There was no circumflex or other mark to attach it to the servants only. It seemed to begin where the legacies ended, as if the idea of giving his legacies exempt from duty occurred to the testator just after he had named all the legatees, and he adopted the marginal note as the best means of giving expression to that idea.

Mr. *Hastings Graham*, Q.C., and Mr. *Low* (of the Scotch bar), contended, for the respondents, the residuary legatees, that interest on the legacies was not payable until the estates were sold. This was a case of postponed distribution. The words "so soon after my decease as practicable" showed the testator anticipated some delay. The observations in *Lord v. Lord* (¹³) seemed to apply here. No trust arose in this case until the litigation with General Sharpe's trustee was ended, and the legacies could only bear interest from that date. In *Turner v. Buck* (¹⁴) the Master of the Rolls said that the legatees could only claim interest from the period at which the sale of the real estate might reasonably have been effected; and that a year from the testator's death was a reasonable period; here two years might not be an unreasonable period where the testator in his will seemed to anticipate litigation before his right to sell the estates could be confirmed. **Duff's Trustees* (¹⁵) was in their favor. [102] *Martinmas*, 1877, was the earliest period at which payment of the legacies could be demanded, and the appellants were only entitled to interest from that date.

(¹) 1862; 24 D., 552.

(²) 1840; 2 D., 1084.

(³) 1852; 14 D., 363.

(⁴) 1 Bro. C. C., 495-9.

(⁵) 1853; 16 D., 1.

(⁶) 1852; 12 D., 486; rev. H. of L., 1 Macq., 243, and 15 D., 17.

(⁷) Mor., 539.

(⁸) 13 F. C., 339; Mor. Ap., 1; 5 Pat. Ap., 525.

(⁹) 1830; 9 S., 87.

(¹⁰) 1836; 15 S., 170.

(¹¹) 5 Beav., 289.

(¹²) 1857; 19 D., 267.

(¹³) Law Rep., 2 Ch. Ap., 782.

(¹⁴) Law Rep., 18 Eq., 301; 9 Eng. R.,

816.

(¹⁵) 1862; 24 D., 552.

On the Marginal Note:—The word “all” means all the legacies against which the words were written. It did not apply to all the legacies in the will. It began with the first servant, and ended with the last gift to servants. The codicil giving a legacy to another servant expressly stated that it was free of legacy duty, whereas the codicil made two days later giving a legacy to Mrs. Charles Bedford contained no such benefit; this showed the intention of the testator, and was in itself a circumflex to attach the words to the legacies to servants only. It was more reasonable to suppose that the testator meant to release from legacy duty his servants than his relatives.

The following opinions were delivered by the Law Peers :

EARL CAIRNS, L.C.: My Lords, these two appeals raise three separate questions.

In the first appeal one of those questions alone arises. In that appeal Sir Thomas Kirkpatrick complains of the decision of the Court of Session ⁽¹⁾, on the ground that it has deprived him of a legacy of £1,000, to which he alleges that he is entitled under the testamentary disposition of William Sharpe. Now, my Lords, the words upon which he relies are these: William Sharpe, in his testamentary disposition of the 13th of June, 1870, and certain days in December, 1871, and 1873, made this gift, “I hereby order and instruct my said trustees to make payment of all my just debts which may stand against me at the time of my death, also the following legacies: To my nephew, Charles Bedford, the sum of £5,000, and the like sum of £5,000 to his brother, Campbell Bedford: to Roger Kirkpatrick, son of my nephew Sir Charles Kirkpatrick, deceased, the sum of £2,000, and to each of his brothers the sum £1,000, the share of any brother predeceasing to go in equal division among the others.” Now Sir Charles Kirkpatrick, deceased, left several sons; the eldest was the baronet, Sir Thomas, *the appellant. The second son was not the son mentioned by name here as Roger Kirkpatrick; he was the third; and there were, besides the baronet, altogether seven. Undoubtedly Sir Thomas Kirkpatrick is a brother of Roger, and the gift is “to Roger Kirkpatrick, son of my nephew, Sir Charles,” “the sum of £2,000, and to each of his brothers the sum of £1,000.” Now, if the matter stood there the case is not one which admits of argument. The question to be asked is, is Sir Thomas a brother of Roger? The answer is that he is; and thereupon the conclusion follows that the

(1) Scotch Cases, 4th Series, vol. v. p. 380.

gift is to him as one of the brothers of Roger. The words are not ambiguous or equivocal (¹). Unless, therefore, there is something in some other part of the will countervailing and taking away that which is here given, the gift is clear and undoubted, and must prevail.

Now, what is said to qualify the effect of these words is this: after giving a number of other legacies the testator continues: "And, finally, so far as I see at the present moment, I desire and require my said trustees to pay over the residue of my whole estate, excepting as before excepted and bequeathed, to Sir Thomas Kirkpatrick, baronet, presently abroad, and the Reverend Riland Bedford, my nephews, equally *among* them, or rather *between* them, share and share alike."

My Lords, I have been in some doubt as to the manner in which the words which I have read have been looked upon in the court below, and treated by the respondents in the first appeal, as doing away with the effect of the words which I previously read. Part of the argument appears to have turned upon a consideration of the cases of double gifts, gifts in the same instrument of two sums to the same person. Those cases have no application whatever to the case of a residue given to a person to whom previously a specific or pecuniary gift has been made. No case could be cited, no case has ever occurred, where any one ever thought of arguing that the cases about double gifts had any application to a case which, *ex specie*, is entirely distinguishable and different from them, the case of a gift of residue following a specific gift.

Then part of the argument was, not that this was a case of *double gift, but that you are to infer from the fact [104 of the residue being given to one of the brothers of Roger, and from the fact of the residue being very large, that therefore when the expression in the earlier part of the will "the brothers of Roger" was used, that really meant the "brothers of Roger other than that brother to whom I afterwards give the residue." Now, my Lords, that is not construing the will of the testator; it is making for the testator a will entirely different from that which he has made. It is introducing and interpolating words which he has not used, and for the interpolation of which there is no authority whatever. It appears to me that the conclusion at which the court below arrived cannot be sustained without doing a degree of violence to plain and unambiguous words for the doing of which I am aware of no authority whatever.

(¹) See remarks, *post*, at p. 104.

My Lords, I have pointed out that the words of the will as to the legacy to Sir Thomas Kirkpatrick were plain and unambiguous, and that where you have clear and unambiguous words in a will it is not for the court to speculate what were the reasons which led the testator to make a provision as to the meaning of which there is no doubt. But I may make one observation which it is as well to refer to. If we were to speculate in this case for a reason, there seems to me to have been a perfectly good reason why the testator should give a definite pecuniary legacy to one of the persons to whom he afterwards gave a share of the residue, because if it had turned out that the two estates of Hoddum and Knockhill were not disponable by the testator, and that he had nothing but his own personal estate to satisfy the legacies, the personal estate at the time of his death being stated as amounting to something over £10,000, the result would have been that all the brothers of Roger Kirkpatrick, including Sir Thomas, might have benefited and would have benefited by the disposition in their favor of pecuniary legacies, and that whereas, for want of residue, Sir Thomas would otherwise have taken nothing by virtue of the gift of the pecuniary legacies, he would in that state of things have taken the same sum of money as his brothers would have taken.

Now, my Lords, in the second appeal two other questions arise. The first is as to interest upon the legacies which are given by will, and there the court below has held that interest is not to be *given from any period anterior to the time when the heritable property, which was the largest property possessed by the testator, viz., Hoddum and Knockhill, was sold, namely, Martinmas, in the year 1877. I must say that it has not been in controversy at your Lordships' bar that the general rule in Scotland (differing somewhat from the English rule) is, that if there is a legacy, pure and simple, given in the ordinary way, it carries interest from the death of the testator, and carries interest at the rate of 5 per cent. But the argument here has been, and it appears to have been adopted by the learned judges of the Court of Session, that there was here, not an independent gift, if I may use the expression, of legacies, but that these sums which are called "legacies" in the will are really portions of the purchase-money of the particular estates specified, namely, Hoddum and Knockhill, and given as such that there was no particular gift of legacies but merely a direction to sell those particular estates; and then, when they were sold, a direction to pay certain specified sums out of the proceeds. I cannot view the will of the testator as admitting of that con-

struction. I will observe, in the first place, that the instructions, as they are called, the "holograph instructions," of the testator of 1870, 1871, and 1873, are to be taken in connection with a trust disposition and settlement of May, 1870, and in fact refer to it and speak as if they were continuations of that trust settlement. Now, by that trust disposition and settlement the testator had conveyed to the trustees all the property of every kind that he possessed, real and personal, including Hoddum and Knockhill, and he had directed them to convert the property into money, and in the first place to pay and discharge his just debts and funeral expenses; and then, secondly, to "apply the residue of the proceeds of the said trust estate and effects in the manner to be specified in any writing under my hand at any time in my life or even upon death-bed." And then taking up that disposition, in his further instructions he takes notice that he had yet to declare what was the manner in which the whole of his estate was to be applied. And then he says: "Being desirous to make my settlement" I "hereby do so according to my wishes, of my whole worldly affairs, and having lately executed a deed of trust in the hands of John Gillespie, writer to the signet, whereby I disposed to *the trustees [106 therein named my whole means and estate heritable and movable to be by them disposed of as I shall direct by any writing under my hand; and being advised by counsel of my right to do so." Then he takes notice that counsel had told him and advised him that he had a disposing power over that which was a large estate, Hoddum and Knockhill; and he directs it to be converted into money. And then he continues, "That being I deem a sufficient instruction to sell, I now proceed to instruct my trustees as to the distribution of the price, viz., of the price of the heritage;" but excepting some movables, as to which there appears to be no doubt that they really do not affect the present question. "I hereby order and instruct my said trustees to make payment of all my just debts which may stand against me at the time of my death, also the following legacies." The legacies are then enumerated, and the enumeration is wound up by these words, "all which legacies I desire my said trustees to pay over from the first and readiest of my salable estate."

Now, I must say that I have never entertained, after reading these words, the slightest doubt that this is a disposition of the universal corpus of the estate of the testator, a direction to turn the whole of every kind into money, not narrowed or confined by a specific reference to Hoddum and Knockhill, but extended to the whole of his heritable and movable

property with the exception of the particular movable property contained in one particular deed; and there is a direction, out of the proceeds, to pay all his debts and all the legacies which are given. And it appears to me that, if it had turned out that Hoddum and Knockhill were not his, and that he had no disposing power over them, so far as he had other property to answer the legacies, the legacies would have been payable out of his other property. They are, therefore, legacies in the ordinary sense of the term, and the law being that ordinary legacies bear interest from the death of the testator, it appears to me that these legacies must bear interest in that way.

My Lords, the third question is as to the legacy duty. Your Lordships have had before you a facsimile of the holograph will of the testator. He wrote on the third page longitudinally in the margin, "all free of legacy duty," with his name signed thus, "William" at the beginning of those 107] words and "Sharpe," at the *end. The words do not extend longitudinally over the whole length of the page; they do not commence at the bottom and they stop short before they come to the top; they are written along a number of lines in which certain of the legacies are given. The court, in Scotland, held, that they are intended to cover and to free from legacy duty not all the legacies given by the will, nor all the legacies in this third page, but those legacies which being with the gift to George Inglis's family, along the margin of which these words do not extend.

Now, I have felt great difficulty, I must say, as to how these words should be dealt with. Perhaps something might be said in favor of their being so incapable of any certain interpretation that they are void for uncertainty; but I certainly cannot arrive at the conclusion of the court below. The court below seem to have acted upon a principle which was entirely arbitrary. The testator might, if he had pleased, have accompanied these words with some signs, something in the nature of a circumflex, to point out what legacies in the will they were to apply to, if he did not intend to apply them to all the legacies. But, he not having done that, I must construe this as an independent sentence written in the margin of the will of the testator. Now what does the sentence say? "all free of legacy duty." As I took the liberty of observing in the course of the argument, the substantive to be supplied to the word "all" must be "legacies" and the sentence must be "all legacies free of legacy duty." If that is the sentence, then, the testator not having limited the application of it by any sign or mark,

or by other words, I can only arrive at the conclusion that it means all the legacies given in his will. Therefore, upon that point, I should submit to your Lordships that the interlocutor of the court below should be varied in that respect also.

What I propose, therefore, to your Lordships to do is, to make these orders: On the first appeal to reverse the interlocutor so far as appealed against and to declare that the court ought on the special case to have found that Sir Thomas Kirkpatrick is entitled, as one of Roger Kirkpatrick's brothers, to receive payment of a legacy of £1,000 under the provision of William Sharpe's instructions to his testamentary trustees, in addition to the share of the residue bequeathed to him; and inasmuch as if the costs were to *come out of the residue it would be making the [108 party who succeeds pay a part of those costs, to order that the respondents should pay the costs of that appeal. On the second appeal to reverse the interlocutor as to interest and as to legacy duty, so far as appealed against, and to declare that the court ought to have found that the first parties are bound to pay to all the legatees interest upon their respective legacies from the death of the said William Sharpe at the rate of £5 per cent. per annum, and that the marginal note or addition by the said William Sharpe on the 3d page of his instructions to his trustees, dated the 13th of June, 1870, relative to his trust disposition and settlement, as to payment of legacy duty on the legacies bequeathed by him, applies to all the legacies given in his will. My Lords, with regard to the second appeal, as the two questions of difficulty in it have been clearly created by the testator, I propose to your Lordships that all parties in the appeal should have their costs out of the estate of the testator.

LORD O'HAGAN: My Lords, on the question raised by the first appeal, I find it impossible to concur with the majority of the learned judges in the Court of Session.

Our duty is to ascertain the true intention of the testator, and to ascertain it from his words. We are not at liberty to indulge in fanciful speculation as to his purpose if those words are clear; and we must not substitute our own notions of justice or expediency for those which, on a fair and reasonable interpretation of them, he appears to have entertained.

Now, I think it quite manifest that, under Mr. Sharpe's instructions to his testamentary trustees, Sir Thomas Kirkpatrick is entitled to the legacy of £1,000 as one of Roger Kirkpatrick's brothers. To each of them that sum was

bequeathed. He was the eldest of them; and the words designate him as distinctly as if he had been specifically named. I do not see, if there was nothing more in the matter, the smallest ground for doubt as to his title; and I observe that Lord Ormidale, for himself, declared it to be clear that Sir Thomas was included amongst the brothers who were the objects of the testator's bounty, and of whom, confessedly, he was one.

109] *If, then, the bequest was, so far, complete, what is there in the rest of the paper to nullify it or call it into question? Absolutely nothing, but the gift of the testator's residue to his nephews, of whom Sir Thomas Kirkpatrick was one. How could the addition take away that which was already vested? Or, on what principle of construction can we determine that the testator's intention was not to bestow a double bounty, when, in clear terms, he did bestow it?

I concur with Lord Cranworth, in the case which has been cited (¹), that if there be two legacies to the same person, and if there be circumstances which satisfactorily indicate that the testator really meant only one to be received, the legatee cannot take both of them. But, in that case, the legacies were both pecuniary, and there was reason for holding that the verbal repetition had not been intended to make them cumulative in fact.

Here, it is quite otherwise. There is a gift of money and a gift of the residue of the entire estate, real and personal; and there is, in my mind, nothing to show that the one was not meant to be superadded to the other. I repeat, that we are not to speculate curiously as to a testator's objects, if he has spoken plainly; and it is not necessary to find a reason for these gifts if they are made in terms intelligible, unequivocal, and capable of enforcement. But if it were, I see no difficulty in supplying such a reason. The appellants have urged that Mr. Sharpe has indicated in his trust disposition some doubt as to his right to devise the real estate of which he had possession. He had consulted counsel upon the point; and his trustees, after his death, were obliged to institute proceedings in the Court of Session to settle it. They succeeded. But in such a state of affairs, and with such a doubt suggested to his mind, was it not reasonable that Mr. Sharpe should provide for his nephew,—the bearer of a title and the head of a family,—some certain provision, whatever might be the issue of a possibly doubtful controversy as to a portion of his estate? And was it wonderful

(¹) 4 H. L. C., 804.

that he should guard against the consequences of loss or diminution of the residue, by bestowing a legacy which was to belong to Sir Thomas independently and at all events? As I have said, the words being clear, we are not obliged *to sustain their operation by any such suggestion; [110 but it seems to me quite reasonable, and sufficient, at least, to overbear the presumption on which some of the learned judges seem to have founded their conclusion, that the "enormity" of the value of the residue was in itself enough to negative and make incredible an intention of giving the pecuniary legacy in addition to it (').

I am therefore of opinion, as to the first point, that Sir Thomas Kirkpatrick, as one of Roger Kirkpatrick's brothers, is entitled to the legacy of £1,000 in addition to his share of the residue, and that the judgment of the Court of Session should be reversed with costs.

On the points which have been raised by the second appeal, I concur with the opinions expressed by my noble and learned friend, and substantially for the reasons which he has given.

I shall only add, as to the interest on the legacies, that they were to be paid, in the testator's words, "from the first and readiest of the salable estate," that they were not chargeable only on the heritable property, or dependent for their payment on the realization of it, and that, according to the law of Scotland, as admitted on both sides, the interest should, in my judgment, be paid not merely from Martinmas, but from the period of the death of the testator.

Besides, as has been noted, the doctrine of constructive conversion is applicable to the case, and that that doctrine is the same in England and in Scotland is apparent from Erskine's statement ('): "Heritable estate directed to be sold and destined to a particular person or persons, or for a particular purpose, becomes movable as soon as the direction is binding." Here, the testator indicates, as strongly as he could, a wish that the trust estate should be realized, and the legacies discharged, in the shortest possible time. The sale was to be as soon "as it can conveniently be done," and the proceeds to be distributed with the least avoidable delay. The "heritable" estate, therefore, became "movable" at once on his death; and the legacies, which vested also on his death, had attached to them the right to interest from that period.

(') Scotch Cases, 4th Series, vol. v, p. 380. (') Nicolson's ed., vol. i, p. 298 (Ed. note).

[111] *On the third point, as to the marginal note, I see no good reason for limiting the generality of its terms,—“*all* free of legacy duty,”—or confining their operation merely to the legacies of the servants. They are on the third and last page of the testamentary paper. They begin immediately opposite to the end of the bequests, running upwards. They are not opposite to *all* the legacies to servants; and the page on which they are written has material portions dealing with the other legacies in continuation from the preceding page. The words themselves would reasonably apply to “*all*” the legacies; and I do not find in their local position any proper ground for limiting their application. This part of the case is very obscure. The words are not unequivocal, and the placing of them is not decisive of their meaning. The provision, such as it is, might, perhaps, be impeached as void for uncertainty, but the case has not been argued on that ground. And if we are driven to give a definite effect to it, I think, with some doubt and hesitation, that the weight of reason is against the limited application which has been made, and that, if it operate at all, it ought to operate on all the legacies.

I am, therefore, of opinion that on the second and third questions, as on the first, the appeal should be allowed and the judgment reversed.

LORD SELBORNE: My Lords, with respect to the appeal of *Kirkpatrick v. Bedford* I agree with Lord Gifford’s opinion; and I do not wish to add anything to what has been already so well said by your Lordships.

With respect to the question (in the second appeal) of interest, I think the sound construction of the holograph will, taken in connection with the preceding deed of trust of the testator’s whole movable and immovable estate (to which it refers, and which by anticipation refers to it), is, that both the debts and the legacies were to be paid out of a common fund, arising from the proceeds of the sale of the immovable, and from the movable estate. No motive is apparent, in the holograph instrument, for separating the proceeds of the immovable from those of the movable estate; and, by the preceding instrument, both had been [112] brought into *one fund, and had been made subject, *primo*, to one “of these liabilities”: viz., the payment of debts. The holograph instrument begins with a declaration of the testator’s intention to make a complete settlement of his “whole worldly affairs,” and it says (in effect) that he is thereby about to give that direction, as to the disposal of his “whole means and estate, heritable and movable,” which

had been contemplated by the prior deed. And what he gives, after payment of debts and legacies, is the "residue" of his "whole estate."

The words relied upon by the respondents in the second appeal (and I must own that I was myself, at first, led astray by them) are those which immediately follow the particular directions as to the sale of the testator's heritable property : viz., "That being, I deem, a sufficient instruction to sell, I now proceed to instruct my trustees as to the distribution of the price, viz., of the price of the heritage." But it does not follow, because he says that the price of the heritage is to be distributable in the manner which follows, he therefore meant that alone to be so distributable. The contrary, I think, is shown by the words of exception, applicable to the separate deed as to movable, which is also, in like manner, excepted in the ultimate gift of the residue; and I cannot read the express direction for the payment of all the legacies out of "the first and readiest" of his "salable estate" as applicable to anything less than the whole and every part of the estate, movable and immovable, which was capable of being sold, and which was all directed to be sold by the preceding deed. The right, therefore, to interest from the testator's death, clearly follows. But it must not be supposed that I should have thought otherwise, even if these legacies had been payable out of the proceeds of the testator's heritable property only. That heritable property is directed to be sold out and out, "immediately, or as soon after" the testator's "decease as" the trustees "possibly can find to be practicable." If possible, therefore, it was to be sold immediately; and, under these circumstances, the right and interest of the legatees who were to be paid out of the proceeds of the sale, would also, in my judgment, be immediate. I see no reason at all why the words of Lord Thurlow, in *Hutcheon v. Mannington* :—

"If he had given any time, I agree, that the intention is to *prevail, if it can be found out (though a testator [113 cannot make an executor answerable for interest, beyond what the law has done); but he must give me some rule to go by. Suppose he had given a real estate in the manner you specify, it is clear that it will neither depend upon the caprice of the trustee to sell, for that would be contrary to all common sense, nor upon his dilatoriness; in some way it may be sold immediately; but I should not inquire, when a real estate might have been sold with all possible diligence; for it might be the very next day, or that very evening; and

therefore the court always in such a case considers it as sold the moment the testator is dead ; for where there is a trust, that is always considered here as done which is ordered to be done ; and the court cannot measure the time. Suppose this property had been in the West Indies, instead of the East, it would have required less time to be remitted ; still less if in Jersey or Cumberland ; and if only 100 miles off, it would have cost a journey of two days at least. In this case it is an immeasurable purpose. I can do nothing with it ; and it must be considered as vested from the death of the testator" ('): which were lately referred to with approbation in your Lordships' House in the case of *Minors v. Battison* (²), should not be applicable to a trust of this sort, under the will of a Scotch as well as an English testator.

As to the legacy duty, I agree with the construction which my noble and learned friend on the woolsack has placed on the words "all free of legacy duty" added in the margin of page 3 of the will ; and I have only to add, that, if their exact local position is to be regarded, they stand opposite to the end of a series of legacies introduced in the preceding page by the words "*also the following legacies,*" and the word "*all,*" with which they begin, corresponds with the words "*all which*" with which the last of the lines written opposite to them ends.

On the First Appeal.

114] *Judgment of the House*:—Ordered and adjudged, That the interlocutor of the Lords of Session, of the 20th of December, 1877, so far as complained of in the said appeal, be, and the same is hereby *reversed ; and it is declared, That the court ought on the special case to have found, that Sir Thomas Kirkpatrick is entitled, as one of Roger Kirkpatrick's brothers, to receive payment of a legacy of £1,000 under the provisions of William Sharpe's instructions to his testamentary trustees, in addition to the share of residue bequeathed to him ; and with this declaration, that the cause be, and the same is hereby remitted back to the Court of Session to do therein as shall be just and consistent with this declaration and judgment : And it is further ordered, That the respondent the Reverend William Kirkpatrick Riland Bedford do pay or cause to be paid to the

(¹) *Ves.*, 386.

(²) 1 App. Cas., p. 452 ; 16 Eng. R., 86.

said appellant the costs incurred by him in respect of the appeal to this House.

On the Second Appeal.

Judgment of the House:—Ordered and adjudged, That the interlocutor of the Lords of Session, of the 20th of December, 1877, be, and the same is hereby reversed as to interest and as to legacy duty, so far as complained of in the said appeal: and it is declared, That the court ought to have found that the first parties are bound to pay to all the legatees interest upon their respective legacies from the date of the death of the said William Sharpe at the rate of five per cent. per annum till paid, and that the marginal note or addition by the said William Sharpe on the third page of his instructions to his trustees, dated 13th June, 1870, relative to his trust disposition and settlement, as to payment of legacy duty, applies to all the legacies thereby given or bequeathed by him; and with this declaration, it is ordered, That the cause be, and the same is hereby remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this declaration and judgment: And it is further ordered, That all parties to this appeal do have their costs out of the estate of the testator.

Lords' Journals, 15th November, 1878.

Agent for Sir Thomas Kirkpatrick: *J. C. Stogdon.*

Agents for the Rev. Riland Bedford: *Grahames & Wardlaw.*

Agents for Charles J. Bedford and another: *J. & J. Graham.*

[4 Appeal Cases, 115.]

J.C.(*), November 26, 1878.

[PRIVY COUNCIL.]

115] *GREAT LAXEY MINING COMPANY, Limited, *Defendants*; and JAMES CLAGUE, *Plaintiff*.

AND CROSS APPEAL.

ON APPEAL FROM THE COURT OF CHANCERY, ISLE OF MAN.

Compensation.

Case in which compensation for damage done to an estate was awarded once for all, so as to take away any right of action for subsequent damage against the defendants, who were held to be not wrongdoers, but persons exercising their rights of mining operations over the land of the plaintiff, subject to paying compensation for the permanent injury thereby occasioned to the said estate.

Williams v. Groucott (¹) distinguished.

APPEAL and cross appeal from a judgment, order, and decree of the Court of Chancery, Isle of Man (June 2, 1876); and from an order and decree of the said court (Nov. 2, 1876). By the said order and decree of the 2d of June, 1876, which was made in a suit brought by the complainant against the defendants, it was amongst other things ordered that the defendants should pay unto or for the use of the complainant the sum of £214 15s., subject to be reduced to £100 in case the defendants forthwith erected a permanent and sufficient stone wall round the reservoir of the defendants mentioned in the decree. By the said order and decree of the 2d of November, 1876, which was made upon a petition to the said court by the complainant, it was amongst other things ordered and adjudged that the said decree or judgment of the 2d of June, 1876, should be rectified, and that [116] the defendants *should only pay to the complainant the sum of £150 and costs to be taxed, and that in case the defendants should within two months erect the permanent and sufficient stone wall in the said order mentioned, the defendants should only pay to the complainant the sum of £35 5s., with costs to be taxed. The facts are fully stated in the judgment of their Lordships.

Mr. *Benjamin*, Q.C., and Mr. *Crompton*, for the appellants.

Mr. *Cohen*, Q.C., and Mr. *Sherwood*, for the respondent.

The following cases were cited: *Williams v. Groucott* (¹);

(*) *Present*:—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(¹) 4 B. & S. (1863), 149.

Backhouse v. Bonomi ⁽¹⁾; *Duke of Buccleuch v. Wakefield* ⁽²⁾; *Aspden v. Seddon* ⁽³⁾; *Caledonian Railway Company v. Lockhart* ⁽⁴⁾.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER: In this case the plaintiff Mr. Clague was the owner in fee simple of a farm in the Isle of Man. The defendants are a mining company who, under a grant from the Crown, were authorized to enter his lands in order to conduct their mining operations, paying him compensation for damage done. He brought a suit in the Chancery Court of the Isle of Man, claiming compensation in respect of the damage which he had suffered from their works, which he laid at £150. There were various heads of damage; but that with which we have principally to deal arose from their construction in his land of a reservoir. The defendants admitted many of the allegations of the bill, and, among other things, they state in their answer that they commenced to dig and excavate a portion of the plaintiff's estate and to deposit rubbish on the surface, "and also formed and constructed a reservoir or dam for water on the said lands of the complainant, and damaged and injured and appropriated to their own use certain timber trees," and so on, —and that they erected fences on complainant's said lands; that by "the continuance of their said works and [117 operations they have continued to permanently damage and injure the said lands, and complainant's estate and interest therein; and that they are ready to pay him compensation for all the loss and injury sustained by him in the premises.

By the terms of an order made by the consent of both parties, it was decreed that a jury shall inquire into, ascertain, and assess the amount of damage and injury done to the lands of the complainant by means of the defendants' works in the bill mentioned, and report thereon for the information of the court.

The jury came to a finding in these terms: "Allowed to enable respondent to erect 540 yards of permanent stone fencing around the reservoir, £114 15s.:" then follow other sums in respect of "land permanently injured," "severance of road," and other injuries, amounting to £100, making the total award of damages £214 15s. Upon this finding of the jury a judgment was given by the court in these terms: "It is therefore hereby ordered and decreed that the defendants do forthwith pay unto or for the use of the complain-

⁽¹⁾ 9 H. L. C., 503.

⁽²⁾ Law Rep., 10 Ch., 394; 12 Eng. R.,

⁽³⁾ Law Rep., 4 H. L., 377.

773.

⁽⁴⁾ 3 Macq. H. of L., 808.

ant the said sum of £214 15s., the amount of the said verdict, subject to be reduced to £100 in case the defendants forthwith erect such permanent and sufficient stone wall round the said reservoir." It appears that the plaintiff thought that such a judgment could not stand, inasmuch as he had only claimed £150; and he accordingly prayed that the judgment which had been entered in accordance with this finding of the jury should be modified. His petition states that "On the hearing of the said cause, complainant's counsel claimed a judgment of this honorable court for the sum of £150 only, explaining that, although the said verdict was for a higher sum, inasmuch as complainant had only claimed £150 by his bill, and as defendants might claim credit for a temporary fence, which had been made by them, as proved by the evidence taken on the said issue, complainant would only move for judgment for the said sum of £150, with costs;" and he accordingly prayed that the judgment be amended. The court reconsidered the case, and finally gave this judgment: "The court is of opinion that the said judgment of the 2d of June last should be rectified, and that the said defendants should only pay to the complainant the said sum of £150, [118] and costs to be *taxed; and that in case the defendants do within two months erect a permanent and sufficient stone wall round the excavation for a reservoir in the proceedings mentioned, that then they should only pay to complainant the sum of £35 5s., being the balance of the said sum of £150 after deducting £114 15s., which the jury have estimated as the cost of building a permanent wall round the reservoir, with costs to be taxed; and the same is so ordered and adjudged accordingly."

The mining company appealed against this judgment, and also against the former judgment, on the ground that the plaintiff is only entitled to £100, and that he is entitled to no damages in respect of the reservoir in consequence of the alleged necessity of building a permanent stone fence round it. The plaintiff filed a cross appeal relating to the form of the decree, which will be referred to presently. The main question is that raised by the defendants.

It appeared that the defendants had made a fence consisting of wooden posts, with some ironwork, which was, and probably would be for some years, sufficient to prevent the plaintiff's cattle from falling into the reservoir. The defendants' contention is that the plaintiff was not entitled to damages in respect of the reservoir, inasmuch as he had suffered none; that if his cattle had fallen into it, or should fall hereafter into it, that would be a subject of damage; that it

might even be a subject of damage if he were unable to place his cattle upon the land adjoining the reservoir, owing to the danger of their falling into it ; but that until he was actually injured in one of these ways he had no claim to compensation. On the other hand, it was contended on the part of the plaintiff that the compensation he had obtained was awarded him once for all for the purpose of indemnifying him in money for the injury which his estate had permanently suffered in consequence of the construction of the reservoir, which must be regarded as a permanent work requiring a permanent fence. Indeed one of the witnesses for the defendants appears to put the plaintiff's case in very much the way in which the plaintiff himself puts it. This witness, a Mr. Lace, says, in his cross-examination, "A stone wall would be the proper permanent fence ; and if the plaintiff is to take it with the present fence on it, he ought to have a permanent *stone fence. Suppose the dam- [119
ages now to be got are to be taken in full for all future damage in respect of the works now done, and the company not bound to keep up the fence, he ought to be allowed in addition the cost of a stone fence." This appears to have been the view of the jury. According to their Lordships' understanding of the case, the jury measured the pecuniary injury to the plaintiff by the sum which he would have to expend in order to put himself in the same position as if no reservoir had been made on his land ; and that this sum was £114 15s., the cost of erecting a permanent stone fence. This view was adopted by the Chancery Court of the Isle of Man, and their Lordships concur in it. Indeed they regard the finding of the jury as a finding on a question of fact, within their competence. They have assessed the damage the plaintiff has sustained, and their assessment is not the worse because they have communicated the principle on which they proceeded and the measure which they adopted.

The case appears to stand very much on the footing of the defendants having bought of the plaintiff the right to maintain a reservoir in his land without fencing it for the future, and without being liable to any further compensation.

Their Lordships, regarding the main question as substantially one of fact, do not think it necessary to go at any length into the examination of the authorities which have been quoted, decided upon very different facts. The case most nearly bearing upon the present is the case of *Williams v. Groucott* (¹), the effect of which may be shortly thus

(¹) 4 B. & S., 149.

stated: A. was in occupation of the land, B. was in occupation of the minerals, and had a right of access to them without paying compensation. He dug a shaft in pursuance of that right, but fenced it so carelessly and inefficiently that a horse of the plaintiff fell into the shaft and was killed. It was held that the plaintiff was entitled to compensation, chiefly upon the strength of the maxim "*Sic utere tuo ut alienum non ledas.*" The defendant there had a right to dig his shaft; but he had not a right to dig it, or to maintain it, in such a manner as to be dangerous to his neighbor who occupied the surface of the adjoining land. The present is not an action against a wrongdoer for a trespass, or against [20] a person negligently and improperly *exercising a right so as to injure the rights of another. It is a claim against persons who are exercising their undoubted rights, —not negligently or improperly, but subject to a condition which did not exist in the case which has been quoted, namely, that they should pay compensation for damage done. That compensation has been assessed by a competent tribunal once for all, which puts the plaintiff in as good a position as if the damage of which he complains had never been done. After receiving that compensation he will have no right of action for any subsequent damage he may suffer from the same cause. These observations, in their Lordships' view, entirely distinguish the two cases.

It only remains to refer to the cross appeal preferred by the plaintiff. The plaintiff maintains that the first part of the decree awarding him £150 and his costs is right; but that it is wrong in going on to give the defendants an option within two months to erect a permanent and sufficient stone wall round the excavation for a reservoir, and in further ordering that if they do so they shall only pay to the complainant a sum of £35 5s., being the balance of £150, inasmuch as it is not the duty of the defendants to erect a wall, but simply to pay to the plaintiff the money value of the injury which he has suffered; and further, that to reduce the claim of the plaintiff to £35 5s., in the event of the defendants erecting the stone wall, is at variance with the finding of the jury that he is entitled to £100 irrespective of such cost.

It appears to their Lordships that these objections to the form of the judgment are valid, and they are disposed to give them effect. The judgment will therefore be modified by striking out so much of it as follows the words "costs to be taxed."

Their Lordships will therefore humbly advise Her Majesty

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that the appeal of the defendants be dismissed, that the appeal of the plaintiff be allowed, and that the judgment be modified as hereinbefore described, and that the plaintiff have the cost of both appeals.

Solicitor for appellant: *F. W. Adams.*

Solicitors for respondent: *Johnston & Harrison.*

[4 Appeal Cases, 121.]

J.C.(*), Nov. 8, 9; Dec. 8, 1878.

[PRIVY COUNCIL.]

***RAMESHUR PERSHAD NARAIN SINGH, Plaintiff; 121**
and KOONJ BEHARI PATTUK and Another, Defendants.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Artificial Watercourse—Right to the Flow of Water—Presumption.

The right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbor's land, do not rest on the same principle. In the former case each successive riparian proprietor is *prima facie* entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin.

Wood v. Waud (1) approved.

Held, in this case, that the plaintiff's legal right to the enjoyment of water overflowing from an artificial reservoir through an artificial watercourse on his neighbor's (the defendant's) land should be presumed from the circumstances under which the same were presumably created and actually enjoyed; subject to the defendant's right to the use of the water for the purpose of irrigating his lands by proper and requisite channels and other proper means.

APPEAL from a decree of the High Court (Aug. 18, 1874), reversing a decree of the subordinate judge of the Gya (July 31, 1873), and dismissing the suit of the above-named appellant.

The facts of the case are stated in the judgment of their Lordships.

The object of the suit was to have established an alleged ancient right as against the respondents, his neighboring proprietors, to have certain of the plaintiff's villages, five in number, irrigated out of a "tâl" or artificial reservoir of water existing on the respondents' land of Mahooet, and to

(*) *Present*:—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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[122] have certain dams erected *and channels for water cut by the respondents removed and filled up, and to have a channel by which the plaintiff alleged he had been in the habit of receiving water for irrigation reopened, and the respondents perpetually restrained from wasting the waters of their "tâl," or from ever discharging its waters, except towards the plaintiff's villages and through that particular channel.

The respondents, in substance, resisted the plaintiff's claim on the ground that the "tâl" in question was kept up by them on their own land for their own irrigation, and was supplied by the "collected rain water" which ran into it, and that they were entitled to use that water for their own benefit, and that the plaintiff had no right such as he claimed.

The subordinate judge deputed an Ameen to visit the ground and make a map and local investigation. The general effect of his report was that the plaintiff's irrigation had suffered from the grandees or dams which the defendants had raised, and from the passages which they had cut to let the water flow out of their "tâl" towards their own lands.

The subordinate judge directed that the plaintiff's claims be granted, and ordered that a decree be given to the plaintiff, and the right to irrigate the lands of mouzah Chahul, &c., with the water of the Mahooet Tâl; that the outlet which, contrary to long-established usage, has been recently dug on the west of the tâl for carrying the water to the Nuddi Ponwar, be filled up, and the new "kurrah" issuing out of the eastern kunwa lying between the spots marked [native character] and [native character] in the Ameen's map be shut up; that the grandees Nos. 1 and 2 be thrown down, and the plaintiff be authorized to keep clear the passage for water from the Mahooet Tâl to the reservoir of the bund of mouzah Chahul, and that the defendants be forever prevented to let out the water of the tâl of Mahooet towards the villages of any proprietors excepting those of the plaintiff, and that the cost, besides interest at 8 annas per centum per mensem, from the date of the decision to the day of payment, be charged to the defendants.

The High Court (Phear and Morris, J.J.) reversed this decision, and were of opinion "that the plaintiff had failed to make any such right as would entitle him to restrain the [123] defendant from *the use of the water which passes along the channel from the tâl Mahooet to the tâl Chahul, and that therefore the plaintiff's suit ought to be dismissed."

They "accordingly reversed the decision of the Lower Court, and dismissed the plaintiff's suit with costs in both courts."

Mr. C. W. Arathoon, for the appellant, contended that according to the razinamah of the 6th of April, 1831, whenever there was any necessity for discharging the water of Tâl Mahooet, it ought to be discharged towards Tâl Chahul, and in no other direction, and anyhow the respondents were bound thereby not to open the said tâl towards the river Ponwar. The evidence and the Ameen's report established the ancient prescriptive right of the appellant to irrigate his mouzahs out of water from Tâl Mahooet; and the acts recently done by the respondents in placing dyber (grandees) in the eastern khonwa to divert the water into the Bahaween river, and in cutting an outlet on the west of Tâl Mahooet, were done with a view to hinder the appellant from the just and rightful use of the water by him, and not, as supposed by the High Court, to irrigate their own lands. The respondents had not an unqualified right to the water in the Tâl Mahooet, and it was a mistake to say that the plaintiff sought to restrain them altogether from the use of it.

Mr. Doyme, for the respondents, contended that the appellant had failed to show any ground on which he should be held to have acquired a right to interfere with the respondents' use and enjoyment of their own water. The reservoir in question was an artificial one, the respondents were not claiming exclusive right in a natural stream, the whole irrigation was merely artificial, and therefore the appellant had no right to prevent their diverting at their own discretion the waters of their own reservoir for the irrigation of their own lands. [SIR MONTAGUE E. SMITH: Do you contend that there can be no right acquired by user in an artificial channel?] See *Arkwright v. Gell* (*), which is an authority in the negative. [Mr. Arathoon referred to *Holker v. Porritt* (*). SIR MONTAGUE E. SMITH: If an artificial watercourse is allowed for some time to empty itself on another's land, *his consent thereto is implied, and it may have been [124 for a corresponding advantage to him.] See Gale on Easements [2d Ed.], p. 181 h. [SIR ROBERT P. COLLIER referred to *Magor v. Chadwick* (*).] It is contended that the overflow upon a neighbor's premises gives that neighbor no right to a continuance of the overflow, even though it has lasted for a century. Reference was then made to *Wood v. Waud* (*),

(1) 5 M. & W., 203.

(2) 11 Ad. & E., 585.

(3) Law Rep., 8 Ex., 107; 12 Eng. R.

(4) 3 Ex., 748; 18 L. J. (Ex.), 305.

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and *Mason v. Shrewsbury and Hereford Railway Company* ⁽¹⁾. The intention of the respondents was not to hinder the appellant's use of the water, but to irrigate their own fields, in consequence of which the water was drained away to the Bahaween river. [SIR MONTAGUE E. SMITH: But it may have been that originally there was a natural overflow of the river on the appellant's land, and that you were allowed to interfere with it on terms of the appellant having the water after you.] The particular channel which leads to the reservoir is an artificial one. It is merely a case of storing water for the dry season, and the water comes down to the reservoir in the rainy season by this channel. [SIR MONTAGUE E. SMITH: There seems to have been something like a general system of irrigation, by a succession of tanks, giving rise to the presumption of a general agreement. It is a strong thing to say that a person whose land has been irrigated for so many years has no right.] It is not shown that the appellant contributes in any way to the maintenance of tank Mahooet, or could complain if the respondents allowed it to go to ruin. There is no presumption of any grant to him, or of any right being vested in him. If any right, what right? A right to an overflow after respondents have had the full use of all the water to any extent they please. [SIR MONTAGUE E. SMITH: No; the right to overflow after you have used the water for certain purposes—i.e., for irrigation.] It is most difficult to say what is overflow or excess water, what is the proper farming discretion, as it were, as to its user, whether a person who has an unlimited right to use water for irrigation purposes uses too much.

Mr. *Arathoon* replied.

125] *Dec. 3. The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH: In this suit the appellant (plaintiff below), the owner of mouzah Chahul and four other mouzahs, complained of the diversion of water, which, as he alleged, ought to flow from an adjoining estate belonging to the defendant, called mouzah Mahooet, to his own.

Mahooet lies to the south of the plaintiff's mouzahs, and the land falls in a northerly direction from Mahooet towards them.

A large reservoir, called Mahooet Tâl, formed by artificial embankments, has existed for a long time in the defendant's mouzah. It appears to be fed partly by water which is brought from a natural river by artificial channels, and partly

(1) Law Rep., 6 Q. B. 578.

by the collection of the rainfall on the adjoining land, and was undoubtedly created for irrigating purposes. A large khonwa (overflow channel) has been cut on the eastern side of this tál running in a northerly direction, by which, and by other channels, water from this tál has flowed to another and lower tál constructed at the northern extremity of mouzah Mahooet, and mainly upon it, called Chahul Tál, from which last tál the water is carried by several channels to mouzah Chahul and the other mouzahs of the plaintiff, for the purpose of irrigating them.

According to the evidence in the case, this system of irrigation has existed beyond living memory.

The complaint of the plaintiff is that the defendant has placed two grandees or dams in the khonwa above described, and has also cut a new channel from the northern part of the khonwa, the effect of which is to prevent the water in the khonwa from flowing to the Chahul Tál, and to divert it altogether from his mouzahs. He also complains that the defendant has prevented the water issuing from the tál on its western side from flowing to his land as it had formerly done, and has carried it into or in the direction of the river Ponwar.

The plaintiff does not dispute the right of the defendant to use the water of the Mahooet Tál for irrigating that mouzah, but, subject to that use, claims, as a right, that the overflow water of the tál and the surplus water, after irrigating the defendant's *mouzah, shall be allowed to [126 flow in the accustomed manner to his mouzahs.

The defence, as their Lordships understand it, is twofold. In the first place, the defendant denies the plaintiff's right to any of the water flowing from the tál; and, secondly, he contends that if any right exists, it is to the overflow of the tál only, and that he has not infringed this limited right.

The subordinate judge passed a decree in favor of the plaintiff, declaring him to have the right to irrigate the lands of his mouzahs with the water of the Mahooet Tál, and giving relief against what he found to be wrongful diversions of the water in the manner which will be hereafter commented upon.

Upon appeal to the High Court this decree was reversed. The judges of that court seem to have considered that the plaintiff had put his claim in such a way that, if affirmed, it would deprive the defendant of the use of the water of Mahooet Tál for irrigating his own mouzah. Their Lordships, however, do not understand the claim to be so extensive as it was thus assumed to be. It does not very distinctly

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appear whether the judges of the High Court meant to decide that the plaintiff had not such a right as they considered him to have claimed, or that he had established no right whatever to the flow of any of the water issuing from Mahoet Tâl. They rested their judgment, however, in a great degree on the fact that the tâl and khonwa are artificial works erected on the defendant's own mouzah.

There is no doubt that the right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbor's land, do not rest on the same principle. In the former case each successive riparian proprietor is, *prima facie*, entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter, any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin. The above distinction seems to be now clearly established, for, although it was said by the Court of Queen's [27] Bench, in the *case of *Magor v. Chadwick* (¹), that it was no misdirection to tell the jury "that the law of watercourses is the same, whether natural or artificial," it was held in a subsequent case, which appears to their Lordships to be correctly decided—*Wood v. Waud* (²)—that this expression is to be considered as applicable to the particular case, and that, as a general proposition, it would be too broad. On the other hand, it appears to their Lordships that the proposition that a right to the use of water flowing through an artificial channel cannot be presumed from the time, manner, and circumstances of its enjoyment, is equally too broad and untenable.

It was said by the court in *Wood v. Waud* (³): "We entirely concur with Lord Denman, C.J., that 'the proposition that a watercourse of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been originally artificial, is quite indefensible;' but, on the other hand, the general proposition that, *under all circumstances*, the right to watercourses, arising from enjoyment, is the same, whether they be natural or artificial, cannot possibly be sustained. The right to artificial watercourses, as against the party creating them, surely must depend upon the character of the watercourse, whether it be of a perma-

(¹) 11 A. & E., 586.(²) 3 Ex., 748; 18 L. J. (Ex.), 305.(³) 3 Ex., at p. 777.

nent or temporary nature, and upon the circumstances under which it is created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary character, and liable to variations."

In a case which occurred soon after this decision, *Greatrex v. Hayward* (¹), Baron Parke shortly states the principle thus:

"The right of the party to an artificial watercourse, as against the party creating it, must depend upon the character of the watercourse and the circumstances under which it was created."

*In the case then in question the court considered [128 that the watercourse was of a temporary nature only, and that no right had been acquired by an enjoyment of twenty years.

In a subsequent case the Court of Queen's Bench directed a new trial, on the ground that the jury might have been misled by the direction of the learned judge who tried the cause, to the effect that if the stream were an artificial one no right whatever could have been acquired in it. The court held the direction was incorrect, "because" (in the words of the court) "although it may have been an artificial watercourse, it may still have been originally made under such circumstances, and have been so used, as to give all the rights that the riparian proprietors would have had, had it been a natural stream": *Sutcliffe v. Booth* (²).

What, then, is the character of the reservoir and watercourses now in dispute, and what are the circumstances under which they were presumably created, and have been actually enjoyed? In the first place, as a question of fact, the Mahooet Tâl appears to be of a permanent nature. Next, the construction of the Chahul Tâl, which receives the surplus water of the upper tâl, by means of the khonwa and other channels, indicates that a permanent and connected system of irrigation for what are now the plaintiff's and defendant's mouzahs, beneficial to both estates, was by these means provided. The fact that this lower reservoir, which seems to have acquired the name of the Chahul Tâl, was built mainly on the defendant's mouzah, leads irresistibly to the conclusion that it was constructed by, or with the consent of, the then owner of that mouzah; and it is evident, from its situation, that its main, if not only, use was to store

(¹) 8 Ex., 293.

(²) 32 L. J. (Q.B.), 186.

water for the convenient irrigation of the plaintiff's mouzahs. Then it is proved that the water has been used and enjoyed for irrigating these mouzahs from a time beyond living memory. It appears to their Lordships that, from all these facts, a presumption fairly arises that this enjoyment had an origin which conferred a right.

It may be that at the time when this system of irrigation was adopted the mouzahs now belonging to the plaintiff and the defendant formed one estate, and if so, on severance, the right to the continued flow of the water in the accustomed [29] channels would *arise and subsist (see on this point *Watts v. Kelson* (1)); or, if the mouzahs were always separate, it may be that, by the construction of the Mahooet Tâl, water was intercepted which would naturally have flowed to Chahul, and that this or some other consideration existed, which led to an agreement between the proprietors respecting the use of the water.

Other circumstances were proved which support the presumption of a legal right to the enjoyment of the water.

In 1831 proceedings were taken in the Criminal Court of zillah Berar by the owners of Chahul against some ryots of Mahooet in consequence of their having closed the khonwa from Mahooet Tâl to Chahul Tâl, which led to a razinamah being come to, dated the 6th of April, 1831, between the Elakadars of the two mouzahs. In that agreement the khonwa is described as being then an ancient one. It recites that disputes arose respecting "the closing of a long standing khonwa of water of the tâl of mouzah Mahooet." The arrangement come to is thus expressed:

"Now between our client aforesaid and the said Rajah Saheb a compromise has been made in this manner: that when the water of the 'tâl' of mouzah Mahooet aforesaid is about to overflow, and there happens to be any necessity for discharging the same, at that time our client aforesaid shall discharge the water of the said 'negar' towards the 'tâl' of mouzah Chahul, &c., through the course of the long standing 'negar,' which the Elakadar of Chahul, &c., declares to be a 'kunwa'; that they shall not open it towards the river Ponwar or in any other direction. And that the power of closing and opening the 'negar' of the 'tâl' of mouzah Mahooet aforesaid, rests with the Elakadar of the said Mahooet. As Moulvi Kasim Ali, 'Elakadar' of mouzah Mahooet, has acknowledged the 'kunwa' of 'tâl' Mahooet towards the mouzah Chahul, &c., therefore a mutual adjustment has been effected, and the contents of the razinamah are true."

(1) Law Rep., 6 Ch., 166.

The effect of this arrangement seems to be that the overflow of the tâl shall be always discharged through the khonwa, and in no other direction. This agreement appears to refer only to the *overflow water discharged from [130 the tâl through the khonwa (which was then apparently the only matter in dispute); but it is a clear acknowledgment of a right to this overflow. This is made plain by the statement that "the Elakadar of mouzah Mahooet has acknowledged the khonwa of Tâl Mahooet towards the mouzah Chahul."

It was objected that this razinamah does not bind the proprietor of Mahooet; but although it was apparently made between tenants, it seems to have been subsequently acted on, and may be properly used to explain the character of the enjoyment of the water.

The parties were again before the Criminal Court in 1864; the Elakadar of Mahooet being on this occasion the complainant. What then occurred appears in the following record of the proceedings:

"Case in respect of the dispute for the use of the water of Tâl Mahooet.

"It is evident that the property in dispute lies in mouzah Mahooet, and is known by the name of tâl.

"It appears that both parties claim the right to use the water collected in this tâl. The point at issue is this: Whether one party alone has the right to the water, or both the parties are entitled to the use of it? It seems that a protracted period has elapsed, that a dispute had occurred regarding this very tâl between the parties concerned in the present case. From the razinamah (deed of compromise) filed by the second party, against the genuineness of which the first party has no reason to object, the above dispute appears to have been decided as follows: That the people of mouzah Mahooet had entered into an arrangement with the opposite party to allow the water of the tâl aforesaid to flow towards the Tâl Chahul, and not to allow the same to flow in any other direction. This proves that although the tâl is situated within the land of the first party, and although by virtue of the razinamah, the first party is vested with the power of discharging or withholding the water, yet the opposite party is entitled to the use of the said water when it is once discharged. Therefore it is

"Ordered, that according to sect. 320 of the Criminal Procedure Code, the first party shall not exclusively hold possession of the *water, the subject of litigation, till [131 the said first party obtain a decision from a competent court

declaring that he is entitled to hold possession without the participation of any other person."

The Mahooet proprietors do not seem to have challenged this decision of the magistrate in the civil court.

The map produced by the Elakadars of mouzah Mahooet in the course of the proceedings just referred to, affords strong evidence in support of the claim of the plaintiff, that the overflow of the tál, and also the surplus water remaining after the irrigation of the defendant's mouzah, ought to flow to the Chahul Tál, without being diverted by the defendant, except for irrigating mouzah Mahooet, and it seems to their Lordships that the subordinate judge was correct in attaching great importance to this map. The witnesses for the plaintiff, to whom this judge gave credit, also prove a continuous use and enjoyment of the water.

It is not inconsistent with the plaintiff's claim that the power of fixing the time for letting off the overflow from the Mahooet Tál should reside with the defendant. The necessity for this operation would obviously occur in the rainy seasons, and it is apparent upon the evidence that in these seasons a considerable quantity of water is let off, which runs down to the Chahul reservoir, and is stored there.

Their Lordships therefore are of opinion that the plaintiff has established a right to have the overflow water of the Mahooet Tál discharged into the khonwa, so that it may flow through it towards the Chahul Tál; and also a right to the flow of the surplus water towards the tál as heretofore. But they think that his whole right is subject to the right of the defendant to irrigate the lands of mouzah Mahooet, and to take by proper channels and other proper means so much of the water as may be proper and requisite for such purpose.

Their Lordships will now consider the evidence of the defendant's interference with these limited rights.

As to the diversion by means of the two grandees, and the new channel on the eastern side of Mahooet, the Ameen has found, and the evidence (to which credit is given by the subordinate judge) supports his finding, that the two grandees, No. 1 and No. 2, obstruct the flow of water from the [32] khonwa into the channels *which lead to the reservoir of Chahul, and thus divert the water which would otherwise have flowed to it, and cause it to run into the new channel cut by the defendant in a north-easterly direction, by which it is ultimately discharged into the river Bahaween.

The defendant does not deny this diversion, but asserts that it was done to irrigate his own lands.

It is, however, found that by the Ameen that neither of the grantees nor the new channel is required for this purpose, and in this also his report is corroborated by the evidence. The subordinate judge of Gya, by whom the Ameen was examined, has adopted his findings, and has also come to the conclusion that these obstructions were made to injure the plaintiff.

The judgment of the High Court does not disturb the above conclusions of fact, and indeed passes them by, the learned judges being of opinion, as already stated, that the plaintiff had failed to establish the right he claimed.

The subordinate judge has ordered that these obstructions should be abated, and their Lordships agree in this respect with his judgment.

As to the alleged diversion to the west, the subordinate judge seems to have considered that the defendant had made a breach in the western bank of the tál, and cut a new passage to carry the water along the western side of his fields to the river Ponwar, and he has ordered this assumed new passage to be closed. This part of the decree seems to have been made under a misapprehension of fact. The Ameen, as their Lordships understand his report, finds that no breach had been made in the western bank of the tál, but he does report that two nalas had been formed, which carried the water to the river Ponwar. It is not very clear, upon the Ameen's report, whether these nalas were cut by the defendant or were naturally formed. He does, indeed, also find that there is a passage for the water to go "to the west of the river Ponwar." This cut or passage, it is to be observed, is not mentioned in the plaint. Even if it had been complained of, their Lordships think that the evidence of any diversion of water by these means to the west is too obscure to warrant a decree directed against any specific act, and, therefore, the decree of the subordinate judge, so far as it directs the closing of the assumed *new passage, [133] ought not to stand. If, however, any acts have been done on the western side of Mahooet contrary to the declaration of right which their Lordships will advise Her Majesty to make, the injunction, which they will also advise, will embrace such acts, and enable the plaintiff to compel their discontinuance.

On the whole case, their Lordships have come to the conclusion that the decree of the High Court cannot be maintained. They are also unable to affirm in its entirety the

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decree of the subordinate judge. In that decree the right is declared in terms which are, in their opinion, too wide and general, and they have already observed that the specific order to close the assumed new western channel is supported neither by allegation nor by sufficient proof.

They also think that it was not correct to insert in the decree a declaration of the plaintiff's right to scour the khonwa. *Prima facie*, and in the absence of evidence to the contrary, such a right is presumed by law to be incident to the right to the flow of the water, but no issue was raised on this point, nor does it appear that any effort of the plaintiff to cleanse the watercourse has been obstructed by the defendant.

Their Lordships will, therefore, humbly advise Her Majesty to reverse both the decrees below, and in lieu thereof to direct that a decree be passed in favor of the plaintiff, declaring that the plaintiff has a right in the overflow of water discharged from the Mahooet Tâl, whenever the same is discharged by the defendant, and that such overflow ought to be discharged into the khonwa on the eastern side of the said tâl, and to flow through the same towards the Chahul Tâl in the accustomed manner for the purpose of irrigating mouzah Chahul and the other four mouzahs of the plaintiff mentioned in the plaint; and also declaring that after the defendant's right to the use of the water of the said tâl for the purpose of irrigating the lands of mouzah Mahooet by proper and requisite channels and other proper means has been satisfied, and subject thereto, the water which may remain after such use by the defendant, ought to flow, in the accustomed channels and manner, towards the Chahul Tâl for irrigating the said mouzahs of the plaintiff, without being diverted therefrom, otherwise than by such diversion as may [34] be occasioned by the irrigation of the *lands of mouzah Mahooet in a due and proper manner as aforesaid; and also that by the said decree it be ordered that the grantees marked No. 1 and No. 2 in the Ameen's map be removed, and that the new kurrah from the said khonwa shown in the same map, from the spot marked by the letter *alif* to the spot marked by the letter *ba* be closed; and that it be further ordered that the defendant be enjoined not to discharge or divert the overflow of the Mahooet Tâl, or the water remaining after irrigating mouzah Mahooet, as aforesaid, in any direction or manner contrary to the above declaration of right.

Their Lordships consider that the plaintiff is entitled to receive from the defendant his costs incurred in the court of

the subordinate judge of Gya, but as an appeal to amend and limit the decree of that court became in their opinion necessary, they think that the parties ought to pay their own costs respectively in the High Court, and they will advise Her Majesty accordingly.

The appellant will have the costs of the appeal to Her Majesty.

Solicitor for the appellant: *T. L. Wilson.*

Solicitors for the respondents: *Watkins & Latley.*

[4 Appeal Cases, 185.]

J.C., Nov. 27, 28, 29, 30; Dec. 3, 4, 5, 1878.

[PRIVY COUNCIL.]

***DAME ADELAIDE CATHERINE AUBERT DE GASPÉ** [135
et al., Plaintiffs; and ANTOINE BESSENER and Others,
Defendants.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, QUEBEC, CANADA.

[SIX CONSOLIDATED APPEALS.]

Code of Civil Procedure (Lower Canada), ss. 946, 947, 948, and 52—Possessory Action—Nature of Possession required to maintain Possessory Action.

The object of a possessory "action on disturbance" within the meaning of and governed by sects. 946, 947, and 948 of Civil Procedure Code of Lower Canada must be definite and certain, and if a piece of land, must be capable of being distinguished by known if not visible metes and bounds, or by some description within sect. 52 of the same code. The possession to be proved must be *une possession annale*, and also a possession capable of being the foundation of a title by prescription, continuous and uninterrupted, peaceable, public, unequivocal, and "*à titre de propriétaire.*"

Held in this case that the plaintiffs had failed to prove such a possession of the land in question as was sufficient to maintain a possessory action.

[4 Appeal Cases, 156.]

J.C., Dec. 6, 7, 10, 1878; Jan. 25, 1879.

[PRIVY COUNCIL.]

***MELBOURNE BANKING CORPORATION, Limited, De-** [156
fendants; and JOHN BROUGHAM, Plaintiff.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Powers of Official Assignee—Release of Equity of Redemption to the Mortgagee—Victorian Insolvency Statute, 1865—Corporation bound by Agreement not under Seal.

A release of an insolvent's equity of redemption to the mortgagee is not *prima facie* beyond the scope of an official assignee's authority; and sect. 27 of the "Insolvency Statute 1865," of Victoria, clearly contemplates the exercise of such authority.

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In re Ball's Patent.

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Where the consideration for such a release is an agreement not under seal by a corporation (mortgagee) to abstain from proving any portion of its debt, and such agreement has been acted on by accepting the release, *held*, that the corporation is bound thereby, and that the consideration has not failed.

[4 Appeal Cases, 171.]

J.C.(*), Jan. 15, 16, 17, 1879.

[PRIVY COUNCIL.]

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*In re BALL'S PATENT.

Admissibility of Evidence—Notice of Objections—Rule 6 passed under 5 & 6 Will. 4, c. 88.

It is sufficient, prior to tendering evidence of instances of anticipation, to state the grounds of objection to the extension of letters patent without stating all the particulars of those objections.

IN this matter, which was a petition in the usual form for the extension of the term of certain letters patent granted to one of the petitioners, James Ball, and dated the 2d of February, 1865, for improvements in the manufacture of sheep-shears, a question of practice arose as to the admission of evidence, having regard to the notice of objections filed by the opponents. The notice of objections stated several grounds of opposition, viz., smallness of merit and of utility of the invention; the petitioners had been sufficiently remunerated, or, if not, they themselves were to blame for the insufficiency; want of novelty; extension if granted, would unduly restrain trade and would be to the public detriment; insufficiency of specification; allegations in the 172] petition were in *many respects untrue. The fourth and fifth paragraphs of the notice of objections were as follows:

"4. That the alleged invention comprised in the said letters patent was not new within this realm at the date of the said letters patent, nor was the petitioner, the said James Ball, the true and first inventor within this realm of the same alleged invention, in proof whereof leave is craved to refer to the following documents published in England prior to the date of the said letters patent (that is to say):

"The specification to letters patent granted to B. Blonk, No. 1507, A.D. 1785, the provisional specification filed with the application of letters patent of E. Brown, A.D. 1854, No. 1048, and the provisional specification filed with the application for letters patent of John Coldwell and William Coldwell, No. 1971, A.D. 1861.

(*) *Present*:—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

"5. That articles of analogous construction to sheep-shears, and particularly tongs used in the manufacture of glass bottles, had been made within this realm by a process similar to that described in the specification to the said letters patent granted to the said J. Ball, and commonly used by bottle manufacturers prior to the date of the said patent. It was a matter of common knowledge in the cutlery trade prior to the date of the said letters patent that articles of cutlery and tools could be and were manufactured by working up blanks previously stamped or cut out of sheets of iron and steel."

At the hearing, with a view to show that the manufacture by the patentee of sheep-shears wholly of steel was wanting in novelty, the opponents put to the petitioners' witnesses in cross-examination, sheep-shears constructed wholly of steel, which it was alleged had been so constructed prior to the date of the patent of Ball. The petitioners objected.

Mr. Aston, Q.C. (Mr. *Macrory* with him), for the petitioners: By the 41st section of 15 & 16 Vict. c. 83, particulars of objections must be given in an action for infringement, and the parties are bound by those particulars. The practice here must be analogous. The opponents have given in their notice instances of anticipation, and they cannot go beyond those instances, or introduce *evidence of [173 which the petitioners are not warned by the filed notice of objections.

The maxim *expressio unius est exclusio alterius* applies.

Mr. Webster, Q.C. (Mr. *Chadwyck Healey* with him): In this court the notice of objections is filed under the 6th rule of the Orders of the Privy Council dated the 18th of November, 1835. The act 15 & 16 Vict. c. 83, has no application in this respect to the practice of this court. Evidence has been admitted under similar circumstances in this court upon several occasions which are not reported: *Henry's Case*; *Sloper's Case*. Reference was also made to *Sugg v. Silber*, a case decided under sect. 41 of this act⁽¹⁾. The refusal to admit evidence in a case such as this would be greatly more serious than would be the case in an action at law. Moreover the petitioners cannot be prejudiced, because it is in the power of your Lordships to allow them every opportunity of examining into the evidence to be adduced.

Mr. Gorst, Q.C., Mr. C. Bowen, and Mr. Mackenzie, for the Crown.

(1) Law Rep., 2 Q. B. D., 493; 21 Eng. R., 223.

SIR BARNES PEACOCK: Their Lordships are of opinion that they ought not to exclude the evidence which is proposed to be adduced. The Rules which were passed under 5 & 6 Will. 4, c. 83 (see Order of Nov. 18, 1835, rule VI), merely require that the parties served with the petition shall lodge at the Council Office within a fortnight after such service, notice of the grounds of their objections to the granting of the prayer of the petition.

Then followed the act of 15 & 16 Vict. c. 83, the 41st section of which enacted that the defendant "in any action in any of Her Majesty's Superior Courts of Record at Westminster or in Dublin, for the infringement of letters patent," and "the prosecutor in any proceedings by *scire facias* to repeal letters patent," should deliver particulars of objections in the manner therein mentioned, and the same section contained a proviso to the effect "that the place or places [174] at or in which, and in what manner the *invention is alleged to have been used or published prior to the date of the letters patent, shall be stated in such particulars."

That section contemplated a different case from the application for extension now before their Lordships and the earlier rule of the Council was unaffected by it.

Their Lordships therefore think that under the rule to which reference has already been made, it is sufficient to state the grounds of the objection without stating the particulars of those objections; and because the opponents had given as much information as they possessed to the petitioners, and craved leave to refer to certain documents, it must not be taken that they intended to say that those documents were the only instances of anticipation upon which they would rely. Moreover, the Attorney-General would clearly have the right to introduce the evidence irrespective of the notice of objections.

Solicitors for the petitioners: *Pitman & Lane.*

Solicitor for the opponents: *J. H. Johnson.*

Solicitor for the Attorney-General: *Solicitor to the Treasury.*

See *Plimpton v. Malcolmson*, 18 Eng. Rep., 649; *Moak's Underhill on Torts*, 655; U. S. R. S., § 4920 and cases cited in margin; *Bates v. Coe*, 98 U. S. R., 31; *Roberts v. Walley*, 14 Fed. Repr., 167.

Section 4920 of the United States Rev. Stat. does not require the names of witnesses as to novelty to be given, but only the names of those who knew

of the thing and where they can be found, and where and by whom the thing was used: *Sutro v. Moll*, 19 Blatchf., 89.

See *Andrews v. Cross*, 19 Blatchf., 294, 307.

In an action for infringement of a patent, it is sufficient for the plaintiff to furnish such particulars of the infringements as show distinctly what

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are the *acts* of infringement he complains of,—that is to say, the article, the making or selling of which he alleges is an infringement upon his patent, and the places at which, and the period during which, he proposes to prove such making or selling, and it is not necessary to specify in what respects or as to what parts or processes of the invention it is an infringement.

If, indeed, the processes are so entirely separate and distinct, as that different kinds or articles or results are produced, as if one produces pictures in oil and another in water colors, it seems that the particulars should specify the one, an infringement upon which is complained of; but if they are merely different modes of producing the same kind of article or result, it is not necessary so to distinguish; and it is not necessary to specify particular persons to whom, or the times at which, the article alleged to be a piracy has been sold; it is enough to state some period *within* which the sales took place: *Talbot v. Laroche*, 2 C. L. Rep., 836.

In an action for the infringement of a patent, particulars of objections deliv-

ered with defendant's pleas, stating that the invention had been used at various places, and amongst other places at Sheffield, Birmingham, and London, is not a sufficient compliance with the 41st sect. of the 15 and 16 Vict. c. 83, which requires the place or places at or in which and in what manner the invention is alleged to have been used, to be stated in particulars: *Holland v. Fox*, 1 C. L. Rep., 440.

A copy of a French patent certified by the Director of the Conservative National des Arts et Meters of France, under the seal of that department verified by the Minister of Agriculture and Commerce, and the Minister of Foreign Affairs under their seals, but not by the great seal of France, is, under § 893 of the Revised Statutes, *prima facie* evidence of the granting of the French patent, and of the date and contents thereof.

Within paragraph 8 of § 4920 of the Revised Statutes, the invention covered by a French patent so certified will be regarded as having been patented by an open and public patent: *Schoerken v. The Swift, etc.*, 19 Blatchford, 209.

[4 Appeal Cases, 174.]

J.C.(*), Jan. 29, 30, 1879.

[PRIVY COUNCIL.]

In re HUGHES' PATENT.

Patent—Non-user of Invention—Presumption of Inutility rebutted—Public Policy—Condition of Prolongation.

In all cases where the utility of a patent has not been tested by actual employment the question to be considered is, whether the evidence is sufficient to rebut the presumption arising from its non-use that the invention is one of no practical utility.

Application for a prolongation of the term granted after strong and unanswered evidence of utility, though the patent had not been used in England during the whole of the term. On grounds of public policy the condition was annexed that the government and all contractors employed by the government should be at liberty to use the invention.

THIS was a petition for a prolongation of the letters patent dated the 1st of February, 1865, granted for the invention of
*“improvements in the construction of armor-plated [175 ships, forts, and other like structures.”

(*) *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

The invention related to the construction of ships of war, turrets, cupolas, and other structures intended to be protected by armor-plating, and consisted of a method of strengthening all such structures by employing, in the manner described in the petitioner's specification, hollow stringers or girders, made with double flanges, of the form shown in the drawings annexed to the specification, running longitudinally, vertically, or otherwise, along or across the said structures. These stringers when used for the protection of ships are riveted to the skins and frames of the vessels, and when used for the protection of forts, turrets, cupolas, and such structures, may be attached to any convenient portion of those structures, and form the backing for the armor plates. Where very great strength is required, the spaces between the stringers and also the hollow in the stringers may be filled with wood or any composition that may be found suitable.

The circumstances under which the application for a prolongation was made are stated in the judgment of their Lordships.

Mr. *Aston*, Q.C., and Mr. *Macrory*, for the petitioner.

Mr. *Gorst*, Q.C., and Mr. *Mackenzie*, for the Crown.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH: This is an application by Mr. John Hughes for the prolongation of a patent dated the 1st of February, 1865, for improvements in the construction of armor-plated ships, forts, and other like structures. The case comes before their Lordships under special circumstances. It appears that the invention has never been brought into actual use in this country during the term of fourteen years for which the patent was granted. It has not been adopted either by the government of this country or by any private shipbuilders.

Mr. Hughes, the patentee, after having been engaged for some time as an iron master in Wales, came to Millwall in the year 1859, and became the manager of the large works [176] known as the *Millwall Works, belonging to Mr. Mare. In the course of his management of these works he was brought into communication with General Burgoyne, who was at that time the director of fortifications, and he was engaged with Sir John Burgoyne upon various matters connected with fortifications. About that time the defence of ships by means of armor-plating was attracting public attention, and the struggle commenced, which it appears is not yet over, between the increasing force and power of projectiles on the one side, and the resisting power which could

be obtained by armor-plating upon the other. It appears that Mr. Hughes' attention was directed to that subject in his communications with Sir John Burgoyne, and that having his mind directed to the subject he produced the invention which is the subject of the patent. The invention is shortly described in his specification as follows: "This invention relates to the construction of ships of war by strengthening them with hollow stringers or girders running longitudinally, vertically, or otherwise. These stringers are riveted to the skin and frames of the vessel and form the backing for the armor plates; the spaces between the stringers, and also the hollow in the stringers, may be filled with wood or any composition that may be found suitable." It is unnecessary for their Lordships to examine with the same degree of stringency which would be done in a court of law, the validity of this patent. It seems to have been assumed in all the experiments which subsequently took place that there was a considerable amount of invention in the method which Mr. Hughes described. The merit of it is said to be that it gives great strength and resisting power to the sides of a ship with less weight of metal than other methods require.

The consideration which has pressed upon their Lordships' minds in this case has been that there has been no use whatever of the invention in this country. Their Lordships in exercising the jurisdiction which is vested in them of recommending or refusing to recommend the prolongation of a patent, are no doubt invested with powers in a great measure discretionary, but in exercising them they must be guided by the rules laid down in previous cases. It is obviously necessary that that should be so, both for the proper administration of what is in the nature of a judicial function, and also for the guidance and security of patentees themselves. Cases have *been before this tribunal [177 on several occasions where the same state of things has existed as in the present, and what may be called the leading case on a similar state of facts is "*Bakewell's Patent*"⁽¹⁾. In the course of giving judgment in that case Lord Chelmsford says: "Now non-user of a patent can hardly be said to be a ground why an extension of the term should be absolutely refused, but it must always amount to a very strong presumption as to the invention not being useful; of course that presumption may be rebutted, as all other presumptions may be, by evidence of the utility of the patent, and if upon this occasion the patentee had been able to give satis-

(1) 15 Moore's P. C. (O.S.), 385.

factory reasons why this patent, which was perfectly well known, had not been introduced into use, that of course would have answered the presumption, which is *prima facie* against him, on account of the non-user of the patent." Their Lordships thought in that case that the evidence that was given did not rebut the presumption and they refused to extend the term of the patent. A few years afterwards another case came before the committee, *Allan's Patent* ('), and there the same rule for the guidance of their Lordships in the exercise of their discretion was laid down. In that case it was held that a sufficient case had not been made out for an extension of the letters patent, and the rule is thus expressed by Lord Romilly, who gave the judgment: "Having all these circumstances present to their minds, their Lordships think that the rule to be laid down by the Judicial Committee in this case is, that where the utility of a patent has not been tested by actual employment for a period of fourteen years, it raises a very strong presumption against its utility which can only be rebutted by the very strongest evidence; and that, upon the present occasion, the evidence, so far from rebutting the presumption rather leads to a presumption that this was considered not to be a practical patent, however theoretical it might be found to be." The question to be considered therefore, in all these cases, is whether the evidence is sufficient to rebut the presumption arising from its non-use that the invention is one of no practical utility. A great deal of evidence has undoubtedly been given in this case. It appears that the attention of the government was very early called to the invention, and that in the year 1868 trials were made of a [178] shield *prepared upon the principle of Mr. Hughes' patent, which was called the Millwall shield, and which was tried and tested in competition with various other shields, and amongst others one called the Gibraltar shield. The Gibraltar shield appeared to be the one which came next in order of merit to that of the Millwall shield, and the result of that trial was to show a great superiority in the Millwall shield over the Gibraltar shield, and reports were made by the officers who superintended those operations which were altogether in favor of the superiority of the Millwall shield. Witnesses of the highest authority have been called on the part of the petitioner, and their Lordships cannot fail to give great weight to the opinions of officers so distinguished as Sir Spencer Robinson, Sir Henry Lefroy, and Sir John St. George; all these witnesses have expressed their opinion

(1) 4 Moore's P. C. (N.S.), 443.

of the value and merit of the invention, an opinion which they formed at the time of the experiments to which allusion has just been made, and which, with all the experience they have since acquired, they still entertain. Other witnesses have been called who have given similar evidence. If the case had stood there, notwithstanding the great weight which it must be conceded attaches to the evidence of those gentlemen, their Lordships would still have felt considerable doubt whether the utility of the invention had been sufficiently established; because, from the fact that the invention has not been adopted by the government, it may be inferred that other officers, of probably the same amount of experience, who have had the responsibility thrown upon them of constructing ships in the manner best suited for the public service, are presumably of a different opinion; but the balance has been turned in the minds of their Lordships in favor of the patentee upon the point of the utility of the invention, a utility sufficiently great to rebut the presumption that would arise from its non-use, by the statements made by Her Majesty's Attorney-General through Mr. Gorst. It is impossible not to suppose that the attention of the admiralty has been called to the present inquiry. The Crown, or the admiralty acting on the part of the Crown, might have opposed the prolongation, but Mr. Gorst has informed us that he has not been instructed to oppose this prolongation; and, further, he has intimated the opinion, which is probably formed not merely from his own view of the evidence, but from the view of those who in- [179] struct him, that upon the evidence this is a valuable invention. If it be valuable it can only be so because, though not yet adopted, it is an invention which at last may be brought into use. The presumption, also, of want of utility is further rebutted, if it be true, as many of the witnesses have stated, and there is no contradiction of it, that a greater necessity than formerly existed arises from the present state of the contest between guns on the one side and armor on the other; for some such method of defending ships by armor as that pointed out by Mr. Hughes, which it is said provides armor with less weight of metal, in proportion to its power of resistance, than any other system. If that is so, it may account for the other modes having been used up to the time when guns had not been made of so great a size, and when the projectiles thrown from them had not the force of those which have now been introduced, and therefore it may be that those methods which have hitherto been in use may become inefficient, and this principle may ultimately be

adopted. It is sufficient to say, upon this point, that the evidence of utility is very strong and unanswered, and is supported rather than controverted by the statement which has been made on the part of the Attorney-General.

There are two cases which are not very dissimilar in their circumstances from the present, where prolongations were recommended by this tribunal. One is *Berrington's Case*, which is referred to in the judgment in *Allan's Patent* (*). *Berrington's* patent was for improved knapsacks. It was the government only which was likely to have used the knapsacks, and the government had not adopted them during the period of the term of the patent. Their Lordships, however, were satisfied that the invention was a useful one and that the government might possibly adopt it, and they extended the patent. The other case was *Ruthven's* patent for water propellers. There also, though there had been no use of the invention during the term of the patent, their Lordships granted a prolongation, and they relied very much upon the course taken by the counsel representing the Crown. Lord Justice Knight Bruce, in giving judgment, said: "They cannot disregard the manner in which the admiralty and those who represent the will of the Crown, or [80] the inclination *of the Crown in cases of this nature, view the matter; and they cannot regard that opinion as unfavorable to the claim of the petitioner." Their Lordships certainly do not regard what was said on the part of the Attorney-General in this case as unfavorable to the claim of the petitioner.

The only other point upon which comment need be made is the condition, if any, upon which this patent should be prolonged. On both sides this consideration has been treated as involving a question of public policy, as undoubtedly it does. Their Lordships think, on the whole, that Mr. Hughes made sufficient efforts in this country to bring the invention to the notice of the government, and, to a certain extent, to the notice of shipbuilders generally; but, failing to get his invention taken up in this country, he appears to have succeeded in getting it taken up by the governments of Belgium and Russia; and in Russia, according to his own account, it has been used to a considerable extent. Mr. Hughes has stated that all the armored ships which have been built in Russia since 1868 or 1869 have been constructed upon his plan, and a part of the fortifications of Cronstadt have been also so constructed. Failing to introduce his invention into practical use in this country,

(*) 4 Moore's P. C. (N.S.), 443.

Mr. Hughes, who had a right, if he so chose, to go to foreign countries and introduce it, succeeded in getting it adopted abroad; but having done so, having exercised that which was his right, their Lordships think that on grounds of public policy the government of his own country ought not to be put, with regard to the use of this patent, in a worse position than foreign governments; and they also think that contractors employed by the government should also be free to use this patent; otherwise this consequence would follow, that inasmuch as a great part, or some considerable part, of the navy of this country is now built in private yards, there might be considerable hindrance to the government in getting ships so built if private builders were to be subject to such royalties as the patentee might choose to impose under this patent.

Their Lordships therefore think that whilst, on the whole, but with some hesitation, they think it right to advise Her Majesty to prolong this patent, it must be upon a similar condition to that inserted in the prolongation granted to Sir William Palliser, which *was expressed in these [18] terms: "Upon condition that the officers of Her Majesty's Government, and all persons who may from time to time contract for the supply of ordnance and projectiles for Her Majesty's service, in respect of work done in the execution of such contracts shall be at liberty to use the same invention or inventions during the continuance of the new letters patent." That is the language used in Palliser's patent. The language will, of course, be changed so as to adapt it to this case.

On this condition their Lordships will humbly recommend Her Majesty to prolong this patent for the term of seven years.

Solicitors for the petitioners: *Thomas Clark & Son.*
Solicitors to the Treasury for the Crown.

[4 Appeal Cases, 182.]

H.L. (E.), April 7, 1879.

[HOUSE OF LORDS.]

182] *EDMUND COWELL MULKERN and J. RUNTZ, *Appellants*; and JAMES LORD, *Respondent*.

Benefit Building Society Rules—Arbitration—Building Societies Act, 1874.

Friendly societies and benefit building societies do not stand on the same footing.

The provisions of the Friendly Societies Act (10 Geo. 4, c. 56) as to the framing, &c., of rules are, by sect. 4 of the 6 & 7 Will. 4, c. 32, made applicable to benefit building societies established under that act.

A benefit building society made certain rules, one of which was, that in case of any dispute arising between the society and any member thereof, reference shall be made to arbitration, pursuant to the 10 Geo. 4, c. 56. L. became a member of the society and executed certain mortgages to the persons who acted as its trustees. In these mortgages he covenanted, among other things, to observe the rules of the society. L. did not keep up the payments secured by the mortgages, and the trustees took possession of some of the mortgaged premises, and sold them. L. brought an action praying for accounts, and an injunction to prevent future sales, &c. The trustees insisted that he was, by the rules, precluded from any right of action, and must proceed by arbitration under these rules:

Held, that the rules did not preclude him from a right of action, for that proceedings in respect of accounts under a mortgage and sale of the property, which might include title to redemption or a judgment of foreclosure, were not such disputes, between the society and a member, as the statutes had contemplated.

Per LORD O'HAGAN: The *onus* of showing that a complaining party has lost the ordinary right to maintain an action lies on him who denies such right.

APPEAL from an order of the Court of Appeal dated the 6th of February, 1878, which had discharged a previous order of the Master of the Rolls, dated the 14th of December, 1877. The appellants were the trustees of the Birbeck Permanent Benefit Building Society, and the respondent was a holder of shares in that society, and was also a mortgagor of property to its trustees.

The rules of the society were duly registered under the Benefit Building Society Acts, in August, 1859, but the society had not been incorporated under the Building Societies Act, 1874 (see s. 7).

183] *In January, 1869, Lord became a member of the society, having subscribed for 242 shares of £50 each, and the directors, upon his application, advanced to him a sum of £12,100, for a period of twelve years, as from the 12th of January, 1869, to be repaid by monthly instalments of £94 each. To secure the repayment, a mortgage was executed by Lord. By this mortgage, dated on the 7th of January, 1869, certain freehold hereditaments were granted by Lord to the trustees, their successors, &c. (subject to certain exist-

ing indentures of lease), to secure to the society payment of all subscriptions, fees, fines, and other moneys, Lord binding himself to observe and perform all the rules and regulations of the said society, according to the tenor and effect thereof; and, in case of default, there was a power to the mortgagees to sell the mortgaged premises.

Lord soon afterwards subscribed for eighty additional shares in the society, and obtained, in like manner as before, an advance of £4,000 for a period of five years from the 5th of March, 1872, to be repaid by monthly instalments of £89 8s. Another mortgage of a similar kind was executed in respect of this loan. The second mortgage was dated on the 16th of March, 1872, and all the premises were farther charged with payment to the trustees of "the additional sum of £4,000 and interest, subscriptions, fees, fines, and other moneys payable by the mortgagor, his executors, &c., in respect of the additional eighty shares, as also of the subscriptions, fees, fines, and other moneys" thereafter to become payable in respect of the thereinbefore mentioned 242 shares.

No payments were made by Lord under these mortgages, and the trustees, in exercise of the powers under the first mortgage, sold part of the mortgaged premises. The 91st rule of the society enabled Lord to adopt measures to redeem the mortgaged premises, but he did not act under those rules, but in August, 1877, commenced an action in the Court of Chancery, and prayed for accounts and for an injunction to restrain the trustees from selling other parts of the property, and for general relief. On motion made in the action, in December, 1877, the trustees appeared, and submitted that under the rules 109, 110, and 111 of the society, Lord was precluded from bringing an action against the trustees, and was bound to submit all matters in dispute *between them to arbitration ('). The Master of the [184

(') The 109th Rule was in these words: "That in case of any dispute arising between the society and any member thereof, or the legal representatives of any member, reference shall be made to arbitration, pursuant to the 10 Geo. 4, c. 56, s. 27, unless such dispute can be amicably arranged by the board of directors and the member, or the legal representatives of such member, within fourteen days from the time such dispute shall be formally brought before the board."

The 10 Geo. 4, c. 56, s. 27 (which is thus referred to in the rule), provides, that rules shall be made (to be confirmed

as required by that act) specifying whether a reference of any matter in dispute between the society and any person acting under it, and any individual member thereof, or person claiming on account of any member, shall be made to justices of the peace of the county, or to arbitrators appointed as thereafter directed. If to the latter, the arbitrators were to be elected at the first meeting of the society, "or general committee thereof," held after the enrolment of the rules, and in case of the death, or refusal to act, of any arbitrator or arbitrators, the society or the general committee thereof was au-

Rolls adopted this view of the matter, and on the 14th of December, 1877, made an order accordingly. The Court of Appeal, on the 6th of February, 1878, discharged this order ('). Lord contended that the rules of the society had no power to prevent him from resorting to an action, but if the other opinion should prevail, he then insisted that the rules of the society had not been observed in the appointment of arbitrators, and that there not being five arbitrators duly appointed according to those rules, they could not be enforced against him.

It was alleged, with reference to this last matter, that before the motion came on for hearing two of the arbitrators originally appointed by the society had died, and no arbitrators to supply their places had been appointed at the next meeting of the society or of the general committee, within the words of the statute, but that two successors were appointed at a "special finance meeting," and "a board meeting" of the society; but it did not appear that notice of appointing them had been given. Of these new appointees one died, and no one was appointed to succeed him, either at a general meeting of the society, or by the general committee.

[185] *This objection as to the arbitrators was not discussed in the Court of Appeal, nor the evidence thereon entered on the order of that court. The appellants, in their papers presented to the House, alleged that the meetings described by the respondent as "a special finance meeting" and "a board meeting," were in fact "the ordinary periodical meetings of the whole of the general committee," and that at the date of the order of the Master of the Rolls there did exist five duly appointed arbitrators under the rules of the society and the provisions of the Common Law Procedure Act, 1854.

The Solicitor-General (Sir H. S. Giffard), and *Mr. Waller, Q.C. (Mr. W. S. Owen was with them)*, for the appellant: The general rule that agreements between private parties cannot oust the jurisdiction of the courts is admitted, but the Legislature has, for public purposes, established some exceptions to it, and this case furnishes an instance.

Taking the rules of the society and the provisions of the statutes regulating benefit building societies together, it is

thorized, at the next meeting, to elect one or more arbitrators, as the case might be, in the place of the others, and whatever award was made by the arbitrators was to be binding on all the parties, and was

to be final, and was not to be removed into any court of law, or to be restrained, but might be enforced by any two justices of the peace.

(1) See Weekly Notes, 1878, p. 25.

clear that this action cannot be maintained. The rules of the society distinctly provide for arbitration in accordance with the 10 Geo. 4, c. 56, s. 27. The general provision of the statute in that section took away from a member of a benefit building society the right to bring an action against the society in respect of any dispute between himself and that body. The object of the law (especially with relation to such societies) must be to prevent needless and possibly vexatious litigation: *Armitage v. Walker* ⁽¹⁾ recognized in *Callaghan v. Dolwin* ⁽²⁾. The 7 Will. 4, c. 32, s. 4, adopted in that respect the provisions of the previous statute. That had been declared to be the policy of the law: *Thompson v. The Planet Benefit Building Society* ⁽³⁾. And the 9 & 10 Vict. c. 95, s. 77, following out the principle of the former statutes, favored the scheme of arbitration, even as to the exclusion of actions in county courts.

The 13 & 14 Vict. c. 115, s. 22, the Friendly Societies Act, s. 22, contained similar provisions as to arbitration. It might therefore *be assumed that the Legislature had [186 deliberately intended that in the case of such societies litigation should be discouraged. In *Ex parte Payne* ⁽⁴⁾ Mr. Justice Erle adopted this view of the law, saying that the object had been "to provide a cheap, simple, and speedy decision," and to oust the jurisdiction of the ordinary tribunals, and he referred to *Crisp v. Bunbury* ⁽⁵⁾, and as to *Cutbill v. Kingdom* ⁽⁶⁾, which appeared to be the other way, he pointed out that the action was there held to be maintainable because the rules of the society in that case did not comprise the matter of that particular action. The case that has been relied on as against the appellants is that of *Morrison v. Glover* ⁽⁷⁾. But in reality that case is like *Cutbill v. Kingdom*, one in which though the defendant was a member of the society, one part of the claim on which the action was brought against him consisted of something that was not, and, indeed, could not be, included within the rules of the society, for in truth it related to a covenant for a payment to a third person. It was not therefore a matter which could be in dispute between a society and the member as member, and consequently it might be the subject of an action. It was on that point, and not on the point of the society being a mortgagee and the defendant, a member of the society, being mortgagor, that the case was decided.

⁽¹⁾ 2 K. & J., 211.

⁽²⁾ Law Rep., 4 C. P., 288.

⁽³⁾ Law Rep., 15 Eq., 338.

⁽⁴⁾ 5 Dowl. & L., 679.

⁽⁵⁾ 8 Bing., 394.

⁽⁶⁾ 1 Ex., 494.

⁽⁷⁾ 4 Ex., 480.

The case of *Fleming v. Self* (*) did not apply, for there the plaintiff's claim was made in respect of matters which the Lord Chancellor in his judgment distinctly declared were matters not in dispute between the society and a member as such, and could not be made the subject of decision by the arbitrators appointed under the society's rules.

In *Willesford v. Watson* (*), which came before Vice-Chancellor Wickens, whose order was affirmed on appeal, the matter in dispute was declared to be within the very words of the agreement, and therefore the order to refer was affirmed, and the objection that the arbitrators had not the same powers as those which could be exercised by a court was met with the observation that that had probably been a matter of consideration when the agreement was entered into, and [187] that reasonable men might have agreed to *incur that possible inconvenience for the very purpose of avoiding litigation.

The case of *Crisp v. Bunbury* (*) proceeded on the principle that these benefit societies were to be saved from the dangers of litigation, and showed that since the 9 Geo. 4, c. 92, no action against the trustees of a savings bank society would be permitted, that all claims and disputes must be settled by arbitration according to the rules of the society itself. The subject was there fully considered, and Lord Chief Justice Tindal (*) observed that even where the words of the section were not in themselves mandatory, but appeared to be only permissive, the declared object of the statute required that they should have a mandatory effect. That case related to the trustees of the Mildenhall Savings Bank, as to which on a former occasion the Court of Queen's Bench had issued a mandamus to compel the trustees to appoint an arbitrator and go into arbitration: *Rex v. Trustees Mildenhall Savings Bank* (*).

In *Reeves and the Trustees of the Southwark Benefit Building Society v. White* (*) it was declared that the rule was imperative, and that the jurisdiction of the courts had been ousted by the statutes, the principle asserted in *Ex parte Payne* (*) and *Crisp v. Bunbury* (*) being expressly adopted. *Morrison v. Glover* (*) was there distinguished on the ground that in that case one of the subjects of the action was plainly not affected by the words of the statute, but related to a matter which could not be described as a dispute

(*) 1 Kay, 521; 8 D. M. & G., 997.

(*) Law Rep., 8 Ch. Ap., 473.

(*) 8 Bing., 394.

(*) 8 Bing., at pp. 399, 400.

(*) 6 Ad. & E., 952.

(*) 17 Q. B., 995.

(*) 6 D. & L., 679.

(*) 4 Ex., 430.

between the society and a member. In *Wright v. The Monarch Investment Society* ⁽¹⁾, which was the case of a building society incorporated under the Building Societies Act of 1874, the plaintiff sought an account of what he claimed to be due to him in respect of an overcharge of the society against him on his mortgage, which he had been obliged to pay, under protest, in order that he might obtain possession of his deeds to hand them over to a vendor of his property. The society applied under the common Law Procedure Act of 1854, and the Building Societies Act, 1874, *to stay proceedings in his action, and the Master of [188 the Rolls granted the application, holding that the jurisdiction of the courts was ousted.

Mr. *Davey*, Q.C., and Mr. *F. W. Bush*, for the respondent: The statement of the claim here shows in a very distinct manner that this is not a dispute between the society and a member, as member, in which case probably some of the cases cited on the other side might be applicable, but is a dispute between the society as mortgagee, and the present respondent as mortgagor, which might exist between them though he was not a member of the society, and quite independently of any membership. The cases therefore which show that disputes of that kind do not come within the provisions for compulsory arbitration apply here. And the first thing that would strike the mind would be this, that if an arbitration under the rules of the society took place, there would be no means, in a case of this kind, by which the decision on that arbitration could be, by either side, worked out. The Legislature never could have intended to compel the parties to enter into an arbitration which must prove in the end ineffectual and abortive. *Morrison v. Glover* ⁽²⁾ was a case of this kind. There one of the covenants of the mortgagor was to pay certain rents to Lord Cadogan, and that being, as it was here, a matter which was entirely unconnected with the character of a member of the society, the action was held maintainable. The statement of the claim here showed that the matter in dispute was a matter as between a mortgagor and mortgagee alone, and not at all as between a society and one of its members. That case in another form came before the Court of Queen's Bench in *Doe d. Morrison v. Glover* ⁽³⁾, and the society was allowed, in the name of John Doe, to maintain ejectment for the premises that had been mortgaged. It was clear, therefore, that unless the subject in dispute was strictly one between

⁽¹⁾ 5 Ch. D., 726 ; 22 Eng. R., 428.

⁽²⁾ 15 Q. B., 108.

⁽³⁾ 4 Ex., 430.

society and member, a proceeding by action might be maintained.

And in *Farmer, Trustee of a Building Society, v. Giles* (*), where money had been advanced to a person who was a member of the society, and who had entered into a covenant [189] to pay, he was, upon *action brought, held not to be bound by the arbitration clause in the articles of the society, for that the transaction was one not between him as a member and the society, but between him as the mortgagor, and the society as the mortgagee of property. The reason for the distinction was clear. The arbitrators in such a case were deficient in authority. No arbitrator appointed under the rules of the society could order the foreclosure of a mortgage. In *Reg. v. Trafford* (*) there was a motion to set aside an order of justices on the ground of want of authority to make it, in a case where the dispute was between a society and a retiring member who had mortgaged his property to it; and it was held that the order was bad for want of jurisdiction. In *Prentice v. London* (*) it was laid down that to bring a dispute within the arbitration clause it must be clearly one which arose between the trustees and the party claiming as a member of the society. It was not so here. In the judgments in that case *Morrison v. Glover* (*) was expressly referred to and recognized.

Crisp v. Bunbury (*) really did not apply to this case, for there the relation between the parties arose directly from the society, and could exist on no other ground. So in *Reeves v. White* (*) and in the other cases cited for the appellant.

The principle of law that parties cannot by agreement among themselves oust the jurisdiction of the courts was expressly affirmed in *Scott v. Avery* (*), and here the words of the statutes do not assist them to do so, for there is nothing in the facts of this case to make it an exception to that rule, nor to give a pretence for saying that it is one in which the Legislature intended to exclude the ordinary jurisdiction of the courts. Here, too, there had not been a proper appointment of arbitrators.

The *Solicitor-General* replied.

THE LORD CHANCELLOR (Earl Cairns): My Lords, the appellants in this case are trustees of the Birbeck Building Society; the respondent is a member of the society who has

(*) 5 H. & N., 758.

(*) 4 El. & Bl., 122.

(*) Law Rep., 10 C. P., 679; 14 Eng. R., 511.

(*) 4 Ex., 430.

(*) 8 Bing., 394.

(*) 17 Q. B., 995.

(*) 5 H. L. C., 811.

*mortgaged property to it to secure a loan of £14,000. [190] He now seeks to redeem that mortgage, and to have an account against the appellants of the moneys received by them on sales of part of the mortgaged estate, and of sums which but for their default they might have received while in possession of the estate, they having been mortgagees in possession. A decree for account and redemption, under the circumstances, would be a matter of course, if the respondent is not in some way precluded from asking for it. The appellants contend that he is so precluded, and that his only remedy is arbitration.

There is not, I think, any doubt that by the rules of this society, standing alone, the respondent would not be prevented maintaining a suit for redemption. The 91st rule it is true states the terms upon which a member is to be entitled to redeem his property before the expiration of the full term for which it was mortgaged; and the 109th and two following rules provide that if any dispute arises between the society and any member, reference shall be made to arbitration. But it is clear that a mere contract of this kind between the parties, unless made obligatory by some act of Parliament, would not of itself have the effect of ousting the ordinary jurisdiction of the courts.

The appellants, however, insist that arbitration has been made obligatory by act of Parliament; and the act of Parliament which they refer to for this purpose is the 10 Geo. 4, c. 56. That is the statute consolidating the law as to friendly societies, societies established for the mutual relief and maintenance of the members in sickness, old age and infirmity, but not in any way contemplating transactions by way of mortgage between the society and its members, much less mortgage transactions of the magnitude of the one now in question. Various provisions were made by that statute for the economical and expeditious management of the petty transactions of such societies, and among the rest, the 27th section enacted that provision should be made in the rules of each society, specifying whether a reference of every matter in dispute between the society and a member, should be made to justices of the peace or to arbitrators. If to arbitrators, the award, assumed to be an award for the payment of money, was to be enforced by a warrant of two justices, and if the *reference was to be made to two justices [191] in the first instance, they were themselves to enforce their order, which was to be final.

It is unnecessary to decide the question, but I will assume in favor of the appellants that in the case of societies regu-

lated by this statute the clause to which I have referred would prevent a member suing the society or its trustees, and would oblige him to submit any dispute which he had, as a member, with the trustees to such an arbitration as is mentioned in the act.

But how does this statute affect the society of the appellants, which is not a friendly society, but a building society established under 6 & 7 Will. 4, c. 32? The argument of the appellants is this: They say that the 4th section of that statute enacts that all the provisions of the Friendly Societies Act, 10 Geo. 4, c. 56, so far as the same or any part thereof may be applicable to the purpose of any benefit building society, shall extend to the benefit building society and the rules thereof, in the same manner as if such provisions had been expressly re-enacted.

Now, I will assume that the mortgage transaction between the respondent and the appellants was one warranted by the constitution of the appellants' society. It is a mortgage of an ordinary kind conveying the legal estate, and constituting the relation of mortgagor and mortgagee, that is, a relationship the consequences of which are well known to the law. That relation creates on the part of the mortgagee a right, in certain events, to enter into possession of the mortgaged property, subject to a liability to account for receipts, and for wilful default; a farther right to exercise a power of sale, if a power of sale is given, and a right to obtain that which a court alone can give, a decree of foreclosure in the event of non-payment of the mortgaged debt. It creates in the mortgagor a right to obtain from the mortgagee an account on the footing I have mentioned, and a right to obtain, what a court alone can give, a decree for the redemption and reconveyance of the property—a decree which, in default of redemption, dismisses the suit, and thus operates as a decree of foreclosure.

This being the relative position, and these the rights of the mortgagor and mortgagee, it appears to me to be impossible that these rights, and especially the rights of foreclosure and redemption, could be enforced or adjusted by such [192] a reference to *arbitration as is provided by 10 Geo. 4, c. 56, s. 27; and I therefore arrive at the conclusion that the provisions of that act are not applicable to those purposes of a benefit building society which involve the adjustment of rights created by mortgage.

It is unnecessary in the view which I take of the case to refer to many of the authorities which were cited during the argument, but I may say that the view taken by Lord Cran-

worth in *Fleming v. Self* ⁽¹⁾ appears to me in substance to coincide with what I have endeavored to express. I think the decision of the Court of Appeal in this case is right, and that the appeal should be dismissed with costs.

LORD HATHERLEY : My Lords, I am of the same opinion. Some authorities were cited which seemed at the first blush opposed to each other, and to be decided by judges of considerable authority both one way and the other. The application to building societies at all of the powers of arbitration arose in this way ; building societies had many objects in common with friendly societies, and many objects in common with savings banks, and consequently this was another instance in which the application of the rule of arbitrations, superseding the jurisdiction of the ordinary courts of justice, was introduced.

On looking into the Friendly Societies Act it was clear that not only was there a choice given between arbitrators on the one hand and magistrates on the other, but there was a set form of conviction in each case laid down ; and two things had to be determined, whether A. should pay to B., or rather to the trustees, a certain sum of money—a definite sum, that being the matter in dispute which was to be settled by the speedy mode of arbitration—and, whether A., continued to be a member of the society, or was not a member of the society, showing again the nature of the dispute, namely, whether a member had or had not misconducted himself so as to be deserving of expulsion for having broken the rules of the society. When you come to look into the authorities which were cited, they amount to this, that where the case went beyond the internal arrangements of the society, and introduced *something which might [193 be within their functions in the ordinary course of their business, but yet still outside the whole scheme and scope of the society itself, then a person who had a much larger interest than any of those contemplated among the ordinary members, could not be deprived of recourse to the ordinary tribunals of the land. And more especially he could not be so deprived in regard to mortgages, where, as in this case, possession was taken, where there was a question as to an account against the mortgagees for wilful default, and where there was an account also for outlay and expenditure on the mortgaged premises by the mortgagees, and where certain other questions had arisen which cannot be properly sifted unless you go to the proper court which has all the

(¹) 3 De G. M. & G., 1080.

means and the powers of sifting and dealing with them. I think, therefore, my Lords, when you see what the real nature of the case is, there cannot be a doubt that this tribunal fell short of the requirements of the case, and that the party who sought to have a decree for account and redemption, was entitled to it.

LORD O'HAGAN: My Lords, the substantial question in this case appears to me to have been settled by a series of decisions of very high authority: and unless your Lordships are prepared to overrule them, I think that the respondent is entitled to succeed. For my part, I see no reason to doubt the correctness of the principles on which they have been founded.

On the undisputed facts before us, it is plain that the respondent is entitled to maintain his action unless the appellants can establish that he has been expressly forbidden by law to bring it. The onus is on them. He is a mortgagor, and has received large advances on account of his mortgage. The appellants are mortgagees. The respondent failed to make the payments which he ought to have made according to his contract, and the appellants have exercised a power of sale given to them in the usual way, and have sold a portion of the mortgaged premises in discharge of the debt due to their society. A large sum admittedly remains unpaid, and only a part of the premises has been disposed of.

In these circumstances, the respondent brings his action and files his claim, demanding an account of the money [194] still due by *him, an account of the money which the appellants have received, or without wilful default might have received, and an injunction to restrain them from disposing of the premises still remaining unsold. This is a very ordinary claim, and would be conceded as a matter of course but for the contention of the appellants that the respondent is a member of their society, and, as such, is obliged by its rules to submit any disputes between the society and himself to arbitration, pursuant to 10 Geo. 4, c. 56, s. 27.

As I have said, the burden of this contention is on the appellants, and the respondent has a right to sustain his action unless that right is taken from him by clear and express legislation. The privilege of appeal to a court of justice remains with him, unless its jurisdiction is statutably superseded.

The appellants rely, *inter alia*, on the 109th rule of their society, which is in these words: [His Lordship read the

rule, see *ante*, p. 184.] And they contend that this rule, which *per se* would be wholly insufficient to take from the respondent his right of action, is made effective for that purpose by the statute to which it refers.

That act was passed "to consolidate and amend the laws relating to friendly societies." It contained provisions for the cheap and easy settlement of disputes between their members, in reference to matters within the scope of their operations; and, if we were dealing with such a dispute as to such a matter, the rule in question, if properly framed according to the statute, would be of binding force. But the society which the appellants represent is a building society, and the provisions of the Friendly Societies' Act are only made to affect it by 6 & 7 Will. 4, c. 32, which was passed "for the regulation of benefit building societies," and by its 4th section enacts that those provisions, "so far as the same or any part thereof may be applicable to the purposes of any benefit building society," shall extend and apply to such society in such and the same manner as if those provisions had been therein expressly re-enacted.

The real question is, whether the provisions are here applicable? And I am clearly of opinion that they are not, and should not be so applied. It seems to me necessary merely to state the nature of the transaction as to which the appellants ask your Lordships *to compel the [195 application of the legal machinery of the Friendly Societies Act, and the character and operation of that machinery, to demonstrate the utter inapplicability of the latter to the former.

The building society which the appellants represent appears to have large monetary dealings. The advance to the respondent was originally £12,000, and £4,000 were afterwards added to it. The powers given to the mortgagees were used on the default of the mortgagor, and the taking of the accounts, which he is entitled to demand, may involve long and laborious calculations, the difficult application of legal principles, and the authoritative interference of a tribunal competent to adjust the complicated relations of the parties, and carry into effect their relative rights. The claim of the respondent may raise nice questions—e.g., as to wilful default, of which only lawyers can be qualified to dispose,—and invokes the exercise of powers by injunction, or otherwise, which belong exclusively to a court of justice.

This, being the nature of the transaction, what is the machinery which the appellants seek to apply to it? That

which manifestly was intended to deal with small affairs amongst humble people, and with simple controversies easily brought to a short and final issue. It aimed to secure mutual assistance to the working classes, in circumstances of difficulty, and to settle their ordinary disputes and enforce their limited demands, at the least expense and in the promptest way. It contemplated the daily dealing of the members one with another, and was in no way adapted to the arrangement of considerable claims and the solution of doubtful questions.

And accordingly, the matters in dispute with which the statute intends to meddle are to be referred, according to circumstances, to an arbitrator or a justice of the peace; the arbitrator to be chosen by the society, and the justice to act in cases submitted to him by its rules. But the exercise of the jurisdiction of either, can only result in the levy of a sum of money to be raised by distress, and how small, even so, must be the amounts meant to be dealt with is shown by the trifling fee allowed to the arbitrator upon a reference, the few shillings of costs given on a proceeding before the justice, and the absolute finality of the award or the judgment which may be pronounced. There can be no appeal from either; and they are not removable into a court of law or restrainable by a court of equity.

196] *Such provisions can plainly have been designed only to regulate disputes of a trifling and domestic kind; and it seems to me idle to suppose that an account of the sums due upon the respondent's mortgage, or of the sums received by the appellants or lost by their wilful default, could possibly be taken by an arbitrator clothed with no special powers, or by an ordinary justice of the peace; whilst the redemption, which the respondent seeks, they must be absolutely without power to secure to him. I should have been of opinion, if we had no guidance from authority, that, for these reasons, the provisions of the Friendly Societies Act cannot be applicable, and ought not to be applied in the circumstances before us. But, as I have said, that view is maintained by many decisions. *Morrison v. Glover* ⁽¹⁾ sustains it, and is undistinguishable from the present case. *Cutbill v. Kingdom* ⁽²⁾ and *Reg. v. Trafford* ⁽³⁾ are to the same effect; and in *Fleming v. Self* ⁽⁴⁾, to which the Lord Chancellor has referred, Lord Cranworth states succinctly the principle adopted in these and other cases: "The total absence of adequate machinery for en-

⁽¹⁾ 4 Ex., 430.

⁽²⁾ 1 Ex., 494.

⁽³⁾ 4 EL. & BL., 122.

⁽⁴⁾ 3 De G. M. & G., 1030.

abling arbitrators to enforce any award they might make on the mortgage, in a case like the present, affords cogent evidence that the dispute is not within their competency." And surely the evidence is as cogent with reference to a justice of the peace, if any one should claim for such a functionary the power of interference.

In the view I take of the matter, it is unnecessary to discuss the question raised at the bar as to the validity of the appointment of the arbitrators. As to the Common Law Procedure Act, I agree with the Court of Appeal, that there being no statutable agreement to refer, no jurisdiction is created under that statute.

I am satisfied, on principle and on authority, that the appellants have failed in their contention, and that the judgment should be affirmed, with costs.

Decree appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 7th April, 1879.

Solicitor for appellants: *J. P. Poncione.*

Solicitor for respondent: *J. H. Kays.*

See 26 Eng. Rep., 307 note; 30 Id., 464 note.

A contract to build a house contained a stipulation, that in the event of alterations or additions they should be valued by the architect, and the cost then added to or deducted from the contract price. Held, that this did not amount to an undertaking by the defendant that the architect should value such alterations and additions when executed: *Duncan v. Shrigley*, 1 Vict. Rep. (Law), 139; *Young v. Board*, etc., 3 Id., 110; *Gowan v. Board*, etc., Id., 123.

Where a building contract provides for payment upon the architect making a certificate of performance, the obtaining of such certificate from the architect is a condition precedent to the builder's right to payment, unless such certificate has been fraudulently or unreasonably refused or withheld, or has become impossible by reason of the death of the architect, or has been otherwise legally dispensed with: *Walsh v. Walsh*, 11 Bradw. (Ills.), 199; *Hartupper v. Pittsburg*, 97 Penn. St. 107; *Walsh v. Johnston*, 6 Wy., Webb & A'Beckett, 77; *Young v. Board*, etc., 3 Vict. Rep. (Law), 110; *Gowan v. Board*, etc., Id., 123.

If a person agrees with another to pay for an article if it accomplishes a particular result, the test to be made by a third person, the decision of the latter is in the nature of an award, and evidence is inadmissible to show that his decision was erroneous: *Robbins v. Clark*, 129 Mass., 145.

Defendant agreed with the administratrix of one J., that he would pay plaintiff's assignors such sum as would appear to be due to them from J. for work and materials, in building a bridge under a certificate from the engineer in charge of the work:

Held, that it was to be inferred that the parties had in mind the certificate of the engineer who prepared the plans and specifications, and who knew what was to be, and what was, done by the plaintiff's assignors; that defendant was not in default until the certificate was presented and a demand made, and that the question as to who was the engineer in charge when the work was done, was a question for the jury: *Wangler v. Swift*, 15 N. Y. Weekly Dig., 350, 90 or 91 N. Y.

A contract for sale of sheep provided that any deficiency in number should be allowed to the purchaser at five shillings per head; and also for the

matters in dispute, to arbitration. There was a very large deficiency. The arbitrator to whom the matter was referred allowed them five shillings per head for the number deficient. Held, that by sending the case to arbitration the vendor admitted the deficiency to be such as entitled the purchaser to more than the five shillings per head: *Ryan v. Broughton*, 2 Vict. Rep., (Law), 49.

Under a clause that certain matters shall be determined by an arbitrator or architect, he has no power to decide what falls within the classes to be determined by him. *Young v. Board*, 3 Vict. R. (Law), 110; *Gowan v. Board*, Id., 123.

The contract authorized alterations to be made, and it was provided that "if such alterations increase the amount of work, such increase shall be paid for only according to the quantity actually done and at the prices fixed, in such proposal for similar work," to be determined by the engineer; after the completion of the work, the engineer gave a certificate of that fact, also stating that certain alterations had been made, which increased the amount of work in the sum of \$12,351.77. Plaintiff knowing the contents of the certificate, received by virtue thereof the balance unpaid of the sum specified in the contract, and the sum specified in the certificate for the additional work, giving a receipt, stating that it was "in payment of the balance due him." Plaintiff presented a claim to the board of audit for a further sum, which was allowed. There was no claim or evidence of error or mistake on the part of claimant in giving the receipt. On appeal, as authorized by the act of 1881 (chap. 211, Laws 1881), held, that the claimant was not entitled to a further sum under or by virtue of the contract; that the adjustment by the engineer with the knowledge of the claimant, and the receipt by him as a final payment, concluded him from making a further demand against the State; also that there was no moral consideration upon which the claim could be based.

The State engineer and surveyor was required by resolution of the legislature to make a survey and estimate of the amount of work done under the contract; said engineer made a report

stating, in substance, that his deputy had made the survey and estimate required. The deputy testified that in making measurements to distinguish between work done under this contract and a subsequent contract relating to the same matter, he received his data entirely from one H., and that the computation was not based upon exact measurements. It appeared that it was impossible to distinguish between the work done under the two contracts. Upon this estimate and information received from others, the engineer reported the work done by claimant, at the prices specified, amounted to \$39,875.12 in excess of what he had received. The claim and allowance was for this excess. Held, that the question before the board was to be determined upon common law evidence; that the report of the engineer was no evidence, and there was nothing to sustain the allowance. (*State Const.*, art. 3, §§ 19, 24): *Swift v. New York*, 89 N. Y., 52, reversing 26 Hun, 506.

A clause in a building contract, providing that if any differences shall arise between the parties in relation to the contract, the work to be performed under it, etc., the decision of the architect shall be final, is a submission of specific questions, and the architect's decision is not binding upon the parties as to matters of dealing entirely outside the contract in question, as a claim for money lent or goods sold and delivered: *Busse v. Agnew*, 10 Bradw. (Ills.), 527, 21 N. Y. Daily Reg., 1129.

A contract contained a condition, that if any dispute should arise, during the currency of the contract, the same should be decided by the engineer, that he should determine the total amount to be paid, and on his final certificate payment should be made. A claim for damages for stopping the works under the contract having arisen, the engineer gave a document purporting to be a final certificate. This document in itself did not contain any reference to damages claimed for hindering or stopping the execution of the contract. Held, that it was only a final certificate for work actually done, that it was quite consistent with the terms of it that a large sum might be due for damages, that there was nothing to show that the engineer had taken such a claim into consideration, and that it

was not an award under the clause referring disputes to the engineer: *Gowan v. Board, etc.*, 8 Vict. Rep. (Law), 241.

A builder made a written contract to furnish the materials and build a house for the defendant according to definite plans and specifications and for a fixed sum, all the materials and work to be accepted by an architect named, who was to superintend the construction. The builder, under the direction of the architect, did certain work variant from and in addition to the specifications, which increased the cost and value of the house. Held, that the ordering of this work was beyond the scope of the architect's agency, and that the defendant was not liable to the builder for it.

When the house was nearly completed, the builder gave the defendant a written statement of the extra work and materials, to which the latter made no objection at the time. Held, that he was not estopped thereby from making the objection afterwards.

The extra work and materials had then gone into the building and could not be withdrawn, so that, as to these extras, the builder was not led into any action resulting in loss to him by the defendant's failing to make the objection.

Some other extras were afterwards ordered by the architect and furnished by the builder; but it did not appear that the builder suggested, at the time of exhibiting his first bill of extras to the defendant, that more extras might be so ordered, or that either party thought of the matter. Held, that the defendant was not estopped, by his failure to object to the first bill, from denying the architect's authority to order the later extras.

The question whether the defendant intended, by not objecting, to influence the future action of the builder, or was so grossly negligent that that intention would be imputed to him, and the further question whether the builder was influenced as to his future action by the defendant's conduct, were questions of fact and not of law, and which the court below could alone pass upon.: *Starkweather v. Goodman*, 48 Conn., 101.

The employe may recover if the engineer or architect's certificate be with-

held by fraud or collusion between him and the employer: *Ranisey v. Board, etc.*, 5 Wy., *Webb & A Beckett (Eq.)*, 16.

Under a contract with a public body, for the construction of certain works to the satisfaction of the engineer of such body, the engineer is not an arbitrator, but a skilled agent of the employer, his certificate being by mutual agreement a condition precedent to the contractor's obtaining final payment; he owes a duty to the contractor as well as to the employer, and is bound to act fairly towards both parties.

Though a final certificate has been refused by the engineer, it is competent to a jury, upon evidence of his acts and conduct, to find that the works have been completed to his entire satisfaction. But the contractor cannot recover from the employer for matters within the contract, unless it is alleged and proved that the certificate was refused by the engineer in collusion with the employer. In such case, the proper measure of damages is the value of the certificate which the engineer ought to have given; and, under a condition that all measurements are to be made according to the most approved and accurate methods, the contractor is not concluded by the progress measurements on which payments have been made. The employer is liable for damages occasioned by the engineer not employing such methods of measurement. The engineer cannot bind the employer to pay for extras outside the contract, unless they have been ordered in the manner provided by the contract.

Under a condition for payment of damages for suspension of works beyond a certain period, the employer is liable for damage resulting from such suspension, though the engineer required it under the form of an "order of works." Actions may be maintained for such suspensions before the termination of the contract.

A final certificate cures the want of previous orders in writing for extras, and other like conditions which are merely auxiliary to the grant of such final certificate; and the result is the same if, under a count for wrongful refusal of the final certificate by the engineer in collusion with the defendant, the jury find that the works were satisfactorily completed, and that the certificate ought to have been given:

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Mulkern v. Lord.

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• *Young v. Ballarat*, 5 Vict. L. R. (Law), 508.

A contract for the erection of a dwelling by T. for B., provides that T. shall complete it in all its parts "in a good, substantial and workmanlike manner, to the acceptance of W. D., architect;" that if a dispute shall arise respecting the true construction of the drawings or specifications, the same shall be finally decided by the architect; but if any dispute shall arise respecting the true value of any extra work, or of work omitted, "the same shall be valued" by arbitrators whose appointment is provided for; and that the work is to be executed "so as to fully carry out the design for said building as set forth in the specifications or shown on the plans, and according to the true spirit, meaning and intent thereof, and, to the full satisfaction of W. D., architect, * * * and to the satisfaction of the owner." Held, that the last provision has no reference to the quality of the workmanship or materials, and as to these, in the absence of proof of fraud, mistake, or unfair dealing on the part of the architect, his acceptance of the work as satisfactory binds the owner.

In an action by the builder upon the contract, the answer alleges that improper and inferior material was used by the plaintiff; and that if the architect "has expressed satisfaction with said work, he has failed to discharge his duty as an architect, and has done so in fraud of the rights of defendant, and through some collusive arrangement, as defendant is informed and believes, between himself and the plaintiff." On the trial, defendant offered evidence to show that one of the floors was made of rotten flooring, and that much of the material used was rotten, etc., and that before plaintiff quit work defendant notified him and the architect that he (defendant) was not satisfied with the work and material: Held, that it was error to reject this evidence, as it tended to show bad faith on the part of the architect in accepting the building, and such proof was admissible under the contract and answer: *Tetz v. Butterfield*, 54 Wisc., 242.

A policy of insurance provided, among other things, that if any difference should arise touching any loss or dam-

age, the matter should, at the written request of either party, be submitted to impartial arbitrators, whose award in writing should be binding on the parties, as to the amount of such loss or damage, but should not decide the liability of the company, and that no suit should be sustainable until after an award should have been obtained in the manner provided, nor unless it was commenced within twelve months after the loss should occur. Held, as neither the number of arbitrators, nor the manner of their appointment was specified, and as there was no way appointed whereby their appointment could be procured, nor their award obtained within the time limited for the bringing of the action; as in case no differences should arise as to the amount of loss (but only as to the liability of the company) no arbitration could be had, and consequently no suit could be sustained; that the clause could not be treated as a condition precedent, compliance with which was essential to the bringing of the action, but as merely an independent covenant, collateral to the agreement to pay: *Mark v. National*, etc., 24 Hun, 565.

Where a policy of fire insurance provided that, in case of failure by the assured and the company to agree upon the amount of loss, the same should be determined by two appraisers and an umpire to be chosen by them, and after a loss had occurred the appraisers failed to agree upon an umpire. Held, that in the absence of bad faith on the part of the company, the insured was not then entitled to his action at law for his damages, but he should have proposed the selection of new appraisers, and done all in his power to carry out the provision as to arbitration: *Davenport v. Long Island Ins. Co.*, 15 N. Y. Weekly Dig., 62.

One of the stipulations in a contract between the plaintiff and defendant companies was, that if any dispute arose between them it should be referred to arbitration, each of the parties to name an arbitrator, and the two within ten days after the appointment of the one last named should appoint an umpire: but if either party should neglect or refuse to appoint an arbitrator for the space of ten days after being requested so to do, or should appoint an arbitrator who should refuse

or neglect to act as such, then the arbitrator of the party making such request should appoint an arbitrator on behalf of the other party.

A notice by the defendant company requiring the plaintiff company to appoint an arbitrator was duly served on the 10th of June, and on the 19th the plaintiff company by cablegram from London named one C. M. D., of New York, as their arbitrator. On the 28th of the same month S., the arbitrator of the defendant company, wrote to C. M. D. requiring him to join in the naming of an umpire, but he wrote saying he was about to leave the city and would return on the 30th; that having been only advised by cable of his appointment, and that his commission would be mailed to him, he could not until its arrival intelligently take any action.

On the 30th C. M. D. returned to his office, and then wrote to S. expressing his readiness to act, and at the same time confirmed a nomination made by his partners during his absence, of an umpire.

Held, 1. That the facts did not establish any refusal or neglect on the part of C. M. D. to act as arbitrator, such as would justify S. in naming an arbitrator in his stead.

2. That the naming by the arbitrators of an umpire was a judicial act which could not legally be performed by the partners of one of the arbitrators, and his subsequent confirmation thereof was ineffectual: *Direct, etc., v. Dominion, etc.*, 28 Grant's Ch., 648.

An agreement in a policy of insurance against fire, to ascertain the amount of a loss by arbitration, does not, in the absence of a stipulation to that effect, make an award a condition precedent to the right of the insured to maintain an action upon the policy: *Canfield v. Watertown, etc.*, 55 Wisc., 419.

An umpire must cite the parties before him and hear their evidence. He cannot decide the question upon a statement of the facts by the arbitrators: *Eaton v. Campbell*, 2 Nova Scotia Dec., 314.

While it may be competent for parties so to frame a submission that the arbitrators may decide the controversy upon their own judgment and observation, without resort to evidence *aliunde*,

yet, as a general rule, the exclusion of proper testimony is fatal to an award, whether the arbitration be statutory or at common law. It is immaterial whether such testimony is excluded by the refusal of the arbitrators to hear it or through the fraud of the opposite party: *Canfield v. Watertown, etc.*, 55 Wisc., 419.

Where there was not an absolute and indivisible contract to build a complete house for a specified sum, but only a contract to do a part of the work and furnish a part of the materials, the remainder to be otherwise provided for, from time to time by the landowner (although the price was a fixed aggregate sum, and no payment was to be made until after the house was completed), and the part built was destroyed by fire before the completion of the whole, and was not restored by the landowner; held, that the contractor might recover for work and materials actually done and furnished by him, especially where the landowner had treated the house as his own, by procuring insurance thereon and receiving the insurance money. The measure of the contractor's damages in such a case is *prima facie* a pro rata share of the contract price: *Cook v. McCabe*, 53 Wisc., 250.

Plaintiff contracted, under seal, to erect a building for defendant according to plans and specifications. The contract provided that if any changes in the plans were desired, their value should be agreed upon and indorsed on the contract, otherwise no allowance should be made for them. The plaintiff was to be paid a certain percentage on the value of the work as it progressed, on the certificate of the architect; but the last payment was not to be made until all the claims for extras had been agreed upon. The plaintiff proceeded with the building, and did a considerable amount of extra work, but before the completion of the building it was destroyed by fire.

Held, in an action on the contract: 1st. That the plaintiff was entitled to recover the percentage on the value of the work done, though the building never was completed. 2d. That he could not recover for the extra work, because its value had not been agreed upon and indorsed on the contract: *Flood v. Morrissey*, 4 Pugs. & Burb., 5.

[4 Appeal Cases, 197.]

H.L. (E.), Nov. 5, 6, 1878; April 7, 1879.

[HOUSE OF LORDS.]

197] *PRYCE and Others, *Appellants*; and THE DIRECTORS, &c., OF THE MONMOUTHSHIRE CANAL AND RAILWAY COMPANIES, *Respondents*.

Railway—Toll—"per Ton per Mile"—Construction of Acts imposing Tolls—Costs where Judges divided in opinion.

A company obtained an act (8 & 9 Vict. c. clxix), authorizing it to construct a railway and to demand tolls for the conveyance of passengers and goods thereon. The charge for the conveyance of goods was generally thus expressed, "per ton per mile not exceeding," &c. One clause provided that "for articles or persons conveyed on the railway for a less distance than four miles" there might be, "in addition to the prescribed tolls for conveyance, a reasonable charge for the expense of stopping, loading, and unloading." No publication of this charge in the form of "a toll" had been made upon the toll-board:

Held, that this "charge" for stopping was not properly a "toll," and that the non-publication of it on the toll-board in the form required by the Railways Clauses Consolidation Act, 1845, ss. 98 and 95, did not prevent the company from demanding it. The judgment of the court below was on this point affirmed.

The 105th clause granted tolls for "a fraction of a mile beyond four miles," &c.; the company claimed such tolls when the whole distance traversed was less than four miles. The Court of Appeal, consisting of Lords Justices James, Mellish, and Baggallay, had been divided in opinion on this point; Lords Justices James and Baggallay holding that on the true construction of the words in the clauses of the act such a charge was justifiable, Lord Justice Mellish holding that it could not be made. On appeal to this House there was again a division of opinion.

THE LORD CHANCELLOR (Earl Cairns) and LORD SELBORNE were of opinion that the charge was, on the whole, warranted by the words of the act, and that the judgment of the court below must on this point also be affirmed.

LORD PENZANCE and LORD O'HAGAN, applying the principle that no charge could be imposed on the public but by the clearly expressed intention of the Legislature, *held* that in this case the Legislature had not clearly expressed an intention, nor had intended, to authorize such a charge.

The judgment of the court below stood affirmed. No costs were given.

Reasons for not giving costs in such a case, as suggested in *Anderson v. Morice* (1) explained.

(1) 1 App. Cas., 713, at p. 750; 18 Eng. Rep., 1.

[4 Appeal Cases 221.]

H.L. (E.), April 29, 1879.

[HOUSE OF LORDS.]

***TURNER, Appellant; and CRUSH and Another, [221 Respondents.**

Inclosure Act—Paths and Ways—Effect of Award.

The words of the 68th section of 8 & 9 Vict. c. 118 (the General Inclosure Act), are positive that all roads and ways not set out by the valuer on making his award, "shall be forever stopped up and extinguished."

H. was possessed of lands in a neighborhood where the General Inclosure Act was about to be applied. He sold some of these lands to T., expressly reserving to himself the allotments that might afterwards be made. The conveyance to T. contained the usual words, "together with all ways, paths, passages, easements, privileges, advantages and appurtenances to the said lands appertaining, or held, used, or occupied therewith." Between the lands purchased by T. and the high road there were certain wastes over which the former holder of T.'s land had, for about forty years, enjoyed the use of certain paths and trackways—which were paths and trackways of convenience, but not of necessity. The wastes were allotted to H.: the valuer, to whom T. had not preferred any claim of right to the paths and trackways in question, made his award, in which other paths and ways were set out, but not those from T.'s lands to the high road. Before the award was made H. had sold his interest in the allotments to C. who, after the making of the award, refused to allow T. the use of the ways in question:

Held, that by the effect of the award they had been stopped up and extinguished, and that the conveyance by H. did not bind him to grant new easements over any land he might acquire by the allotment.

[4 Appeal Cases, 228.]

H.L. (Sc.), March 20, 1879.

[HOUSE OF LORDS.]

***MRS. WIGHTMAN, Husband and Others, Appel- 228
lants; MRS. COSTINE, Widow, Respondent (').**

*Agreement to disentail—Declaration of Trusts—Power of Revocation—Jus
quasitum tertio.*

A father, being desirous to disentail his estate, procured the consent of the next heir, his eldest son. The minute of agreement between them provided that the father should pay absolutely to the son £4,000; and secondly, should pay to trustees the further sum of £3,000, for the benefit of the son; it being open to the father to limit the power and control of the son over the said £3,000, to such extent, and in such manner, as he should think proper; "and in particular," to direct the trustees to hold it for the son's behoof "in life-rent only, and for the issue of his body in fee, whom failing, to his nearest heirs and assignees."

Three months afterwards, a bond was executed by the father as security for the £3,000, in favor of the trustees "and for the ends, uses, and purposes, expressed in a

(¹) Affirming Court Session Cases, 4th Series, vol. v, p. 782.

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declaration of trusts," of even date therewith. The deed of declaration restricted the son's interest to an alimentary life-rent; and failing his issue, the fee was given to his aunt and her children. The son declared his acquiescence in the bond, and declaration of trusts, which were subsequently delivered to the trustees, who paid the income of the £3,000 to the son.

After the father's death, the son married; and subsequently died, survived by his widow, but without issue. He left a deed by which he revoked the destination in the declaration of trusts in favor of his aunt and her children, and bequeathed the £3,000 to his widow.

Held, affirming the decision of the court below, that the deed of revocation was effectual, the destination in favor of the aunt and her children being purely of a testamentary nature; and that no *jus quasitum tertio* had been created.

Per LORD SELBORNE: The son could not possibly be bound by any erroneous interpretation which the trust deed might have put upon the original contract, so as to substantially vary its operation and effect, either on the principle of estoppel, or any other, unless there were some new bargain, or new consideration.

APPEAL from an interlocutor of the second division of the Court of Session. Mr. John Costine, senior, resolved to disentail his estate of Glensone in the stewartry of Kirkcudbright. His eldest son, John, the heir of entail, consented to the disentail in consideration of the payment by his father 229] to him of £7,000. Of *this sum £4,000 was to be paid direct to John himself, and £3,000 to trustees for his behoof. It is regarding the ultimate destination of the £3,000 that the question in the present case arose.

The minute of agreement between the father and the son was dated the 20th of October, 1870, and bore that John Costine, junior, had agreed to a disentail on the following terms: First, John Costine, senior, bound and obliged himself to pay to John Costine, junior, the sum of £4,000, to be secured by bond and disposition over the said lands of Glensone, to be executed immediately on the authority to disentail being granted by the court. Second, John Costine, senior, bound himself at the first term of Whitsunday or Martinmas after the disentail had been completed, to pay to Robert Swan, and three others named, "or the survivor of them, the further sum of £3,000 sterling, to be held by them in trust for the use and behoof of the said John Costine, junior; but it shall be lawful for the said John Costine, senior, to limit the power and control of the said John Costine, junior, over the said sum to such extent, and in such way and manner as he shall think proper; and in particular it shall be in the power of the said John Costine, senior, to direct the said trustees to hold the said sum of £3,000 for behoof of the said John Costine, junior, in life-rent only, and for the issue of his body in fee, whom failing, to his nearest heirs or assignees; and it shall also be in the power of the said John Costine, senior, to limit the interest of the said John Costine, junior, in the said sum of £3,000,

to that of a life-rent alimentary provision, which he shall have no power to assign, and which shall not be liable to be attached by the diligence of his creditors." And the said John Costine, senior, binds himself to grant to the trustees a bond and disposition in security over the estate of Glensone, for the sum of £3,000. And then, by clause fourth, the said John Costine, junior, accepts of the provisions in his favor above written as full satisfaction and compensation for giving his consent to the disentail of the said estate.

On the 26th of December, 1870, the prayer of the petition for disentail was granted by the Court of Session, and duly recorded. On the 31st of January, 1871, Mr. John Costine, senior, in settlement of his obligations to pay the two sums fixed by the agreement *of the 20th of October, 1870, [230 executed, first, a bond and disposition in security for the £4,000 in favor of John Costine, junior; and second, a bond and disposition over the estate of Glensone, for the £3,000 in favor of Robert Swan and the other trustees for behoof of John Costine, junior. Then followed, *inter alia*, this clause, "but it is hereby provided and declared that these presents are granted by me (John Costine, senior), in trust only, and for the ends, uses, and purposes expressed in a deed of declaration of trusts executed by me of even date herewith." And then came this declaration by the son. "And I, the said John Costine, junior, hereby declare my concurrence and acquiescence in the above written bond and disposition in security, and in the said deed of declaration of trusts, which is also subscribed by me of even date herewith, and we consent to registration for preservation and execution." This bond was signed by both father and son, and registered on behalf of the trustees in the register of sasines on the 3d of February, 1871.

The deed of declaration of trusts referred to above, after reciting the resolution to disentail, the agreement thereto of the son, and the appointment of trustees to hold the said sum of £3,000 for the ends, uses, and purposes after mentioned, John Costine, senior, declared:

"First, That they (the trustees) shall invest the said sum in their own names, as trustees foresaid, and pay the interest or annual produce thereof to the said John Costine, junior, during his life, at such times, and in such sums as they may think proper; and in virtue of the power reserved to me by the said minute of agreement, I hereby declare the said interest or annual produce to be a life-rent alimentary provision in favor of the said John Costine, junior, which

shall not be assignable by him, nor affectable by his debts or deeds, nor subject to the diligence of his creditors. Second, That upon the death of my said son, the said trustees shall hold the said principal sum in trust for behoof of the lawful issue of my said son and the heirs of their respective bodies, and shall pay and divide the said sum equally among them and the survivors of them *per stirpes*. . . . Third, In the event of my said son dying without leaving lawful issue, or upon the failure of such issue, the 231] said trustees shall hold the said sum of *£3,000, or the balance thereof, if any part shall have been paid to or on account of the issue of my said son, in trust for behoof of my sister Isabella Costine or Wightman . . . and for behoof of her lawful issue," &c. Then followed the consent of John Costine, junior: "And I, the said John Costine, junior, hereby declare my acquiescence and concurrence in all the provisions herein contained; and we consent to the registration hereof for preservation," &c.

Also, on the 31st of January, 1871, John Costine, junior, executed a deed of discharge; whereby, after reciting the terms of the agreement, and that his father had granted the bond and disposition of security for the purposes set forth in the deed of declaration of trusts, he exonerated and acquitted and *simpliciter* discharged the said John Costine, senior, his heirs, executors, and representatives whomsoever of, *inter alia*, the said sum of £3,000 and of the whole obligations undertaken in the minute of agreement. The lands and estate of Glensone were sold at Whitsuntide, 1871, and the £3,000 paid to the trustees, who thereafter paid the income to John Costine, junior, in accordance with the deed of declaration of trusts which had been delivered to them. At the date of these transactions John Costine, junior, was unmarried. His father died in August, 1871; and in January, 1874, John Costine, junior, was married to the respondent, then Miss Katherine Hay Crichton. He died on the 17th of March, 1877, survived by the respondent, but without issue. On the 4th of March, 1877, he executed a deed by which he revoked the destination in favor of his aunt and her children, the appellants in the declaration of trusts, and bequeathed to the respondent the £3,000.

The deed of revocation after reciting the resolution to disentail, ran as follows:

And considering that my consent was given to the disentail of the said lands in consideration of my father undertaking to make payment to me, or for my behoof, of the sum of £7,000; and an agreement to that effect was entered into between us, dated 17th and 20th days of October, 1870; and considering that I

received from my father £4,000 in part payment of said sum, and that at the request of my said father I consented to the remaining sum of £3,000 being invested in trustees for my behoof, which was done by my father executing a bond and disposition in security for the said sum of £3,000 over the said lands of Glensone, in favor of Robert Swan, of Brae, in the parish of Lochrutton; James *Millar, &c., . . . and considering that the said sum of £3,000 was my [232 own money, and that I am entitled to revoke the conveyance thereof in trust to the persons before named; and considering that I have married since the execution of the said bond and disposition in security, and relative deed of declaration of trusts, and that it is now my desire to bestow the said sum of £3,000 upon Katherine Hay Crichton or Costine, my wife, in the event of my death: Therefore I do hereby revoke and recall the said deed of declaration of trusts, and all other deeds and writings whereby the said sum of £3,000 is placed beyond my control, or destined after my death; and I leave and bequeath, assign and convey, to and in favor of my said wife, in the event of her surviving me, the said sum of £3,000, and all deeds and writings whereby the same is vested in the trustees before named, or the survivors of them.

The minute of agreement, and the deed of declaration of trusts were recorded on the 10th of April, 1877, and the deed of revocation on the 13th of April of the same year; all being after the death of John Costine, junior.

On the death of her husband, Mrs. Costine claimed the £3,000, contending that the consent of John Costine, junior, to the disentail was given on condition of his receiving out of the price of the sale of the estate of Glensone such sum as should be ascertained as the value of his interest, and that an actuary having been consulted the sum of £7,000 was agreed upon as the price; that the £3,000 was part of that sum, and had during his life always been treated by John Costine, junior, as his property; and that the deeds of 1871 having constituted a revocable disposal of the said sum by him, the destination in the declaration of trusts was effectually revoked by the deed of the 4th of March, 1877, in her favor.

Mrs. Wightman and her children also claimed the £3,000, maintaining that the deed of John Costine, junior, of 1877 was invalid, and had no force or effect as a revocation of the declaration of trusts, and that, therefore, John Costine, junior, having died without lawful issue, the third purpose of the deed of declaration of trusts was now operative. The trustees having raised a multiplepounding, the *fund in medio* being £3,000 and accrued interest, the Lord Ordinary⁽¹⁾ pronounced an interlocutor in favor of the claim of Mrs. Wightman and children.

A reclaiming note having been presented to the Court of Session against this decision, the second division (Lord Ormisdale dissenting), on the 19th of March, 1878, recalled the

(¹) Lord Curriehill.

233] Lord Ordinary's *interlocutor, and found Mrs. Costine alone entitled to the *fund in medio* (*).

On appeal,

Mr. *Benjamin*, Q.C., and Mr. *M'Clymont* (of the Scotch bar), contended for the appellants that the £3,000 never was the property of John Costine, junior, and he had no right to or interest therein other than that conferred on him under the deed of agreement. The deed of trust had been executed by John Costine, senior, with the consent and acquiescence of John Costine, junior, expressly as an exercise of the power reserved to him under the agreement. The son was, therefore, debarred from revoking that deed, or challenging it as being not warranted or authorized by the minute of agreement. By the deeds executed in 1870-1 an onerous mutual contract or family arrangement *inter vivos* was constituted, which could not be altered by one of the parties without the consent of the other, and certainly not after the death of that other party. Also by the delivery of the deed of trusts to the trustees, and the registration of the bond in the register of sasines, a *jus quæsitum* was constituted in favor of the appellants, which could not be revoked by John Costine, junior. Their further argument is fully commented on, and dealt with, in the opinions of the Law Peers. [They cited or relied on *Stair*, 1, 10, 5; *Bell's Prin.*, sect. 64; *Erskine*, 1, 6, 29; *Kidd v. Kidd* (*); *Campbell v. Hogg* (*); *Downie v. Mackillop* (*); *M'Gowan v. Robb* (*); *Boyd v. Curdy* (*); *Gordon v. Dewar* (*); *Warnock v. Murdoch* (*); *Gentle v. Aitken* (*); *Fletcher v. Fletcher* (*).] See also as to payment of legacy duty: *Advocate-General v. Trotter* (*); *Brown v. Advocate-General* (*); *Thompson v. Browne* (*).

234] *The *Lord Advocate* (Right Hon. *W. Watson*), and Mr. *E. E. Kay*, Q.C., appeared for the respondent, but were not called upon to address the House (*).

The following opinions were delivered by the Law Peers :

(*) Court Sess. Cas., 4th Series, vol. v, p. 782.

(*) 10 Dec. 1863; Court Sess. Cas., 3d Series, vol. ii, p. 227.

(*) 18 March, 1863; Court Sess. Cas., 3d Series, vol. i, p. 647.

(*) 5 Dec. 1848; Court Sess. Cas., 2d Series, vol. vi, p. 180.

(*) 14 Dec. 1862; Court Sess. Cas., 3d Series, vol. i, p. 141; 35 Scotch Jurist, 73.

(*) 1775; *Morr.*, 15, 946.

(*) 1771; *Morr.*, 15, 579.

(*) 1759; *Morr.*, 7730.

(*) 23 June, 1826; Court Sess. Cas., 1st Series, vol. iv, p. 749.

(*) 4 Hare, 67.

(*) 12 Nov. 1847; Court Sess. Cas., 2d Series, vol. x, p. 56.

(*) 1 Macq., 79.

(*) 3 My. & K., p. 32.

(*) They cited in their printed case, *Lang v. Brown*, 24 May, 1867, Court Sess. Cas., 3d Series, vol. v, p. 789; *Mitchell v. Mitchell's Trus.*, 5 June, 1877, *Ibid*, 4th Series, vol. iv, p. 800. See also *Shaw's Digest*, vol. ii, p. 988; *Bell's Lect.*, vol. i, p. 106, and vol. ii, pp. 962, 963, 974.

EARL CAIRNS, L.C.: My Lords, an elaborate and lengthened argument has been presented to your Lordships in this case, ranging over a number of legal questions, as to which in the abstract there cannot, I think, be much doubt. But the first inquiry to be made, as it seems to me, is what exactly are the facts of the present case, and what was the position of the parties concerned. If your Lordships arrive, as I have no doubt you will, at a correct appreciation of those facts and of that position, you will not, I think, find much difficulty in determining what is the law to be applied to them.

Now, your Lordships have here the case of an owner of a Scotch entailed estate in possession. He was desirous of barring the entail, and for the purpose of effecting that object he had to obtain certain consents, and notably the consent of his eldest son. The obtaining of that consent became, as it was perfectly right it should become, a matter of bargain between him and his eldest son, and a bargain was ultimately struck for that purpose. The terms of that bargain are expressed in writing, and there can be no doubt or controversy as to this, that the terms must be extracted from the writing, and the writing appears to me reasonably plain as regard the construction of it. I will ask your Lordships' attention, therefore, in the first place, to what was the agreement which was arrived at between the father, John Costine the elder, and his son, John Costine the younger; and I will say at the outset, that, so far as I can understand these papers, that agreement is the only agreement that ever was arrived at between the parties. I find no trace of either father or son intending afterwards to alter the agreement. I find them nowhere coming together and entering into a new arrangement between them. Any new arrangement, if come to between them, would have been wholly without consideration. The consideration for this agreement was the disentailing of the estate; when that was accomplished any further agreement could only have been a gratuitous one; in point of fact, as it seems to me, no further agreement, no substituted agreement, ever was formed between the parties. [235

Now what was the agreement between the father and the son as expressed in the writing to which I have referred? The father was to pay for obtaining the consent of the son to the disentailing of the estate a sum of £7,000, but that payment was to be made in two different sums. £4,000 was to be paid or secured to the son absolutely and without any kind of qualification. The residue of the sum, £3,000, was to be secured and the security was to be in the names of trus-

tees. A bond was to be given to the trustees for the sum, and the enjoyment by the son of that sum was to be qualified in the way I am now going to describe.

In the contract between the father and the son, which is the agreement of the 20th of October, 1870, it was provided as to this £3,000, that it was to be held by the trustees. And the trusts which are mentioned of this £3,000 are divided into three sentences, the first of which was to be, says the agreement, "in trust for the use and behoof of John Costine, junior;" and if it had stopped there, that simply would have been a declaration of unqualified proprietorship on the part of John Costine, junior, of the sum of £3,000. But what follows qualifies this absolute proprietorship. The second clause is this: "It shall be lawful for said John Costine, senior, to limit the power and control of the said John Costine, junior, over the said sum to such extent and in such a way and manner as he shall think proper." Now if we stopped here at this second stage of the declaration of trust, your Lordships would have that which in its terms would be a complete repugnancy between these two sentences. You would have in the first sentence a declaration of absolute proprietorship in the son; you would have in the second a right in the father to take away and destroy that proprietorship. That could not have been the *intention of the parties, and unless you were absolutely driven to that result, you would not so construe the instrument.

But the third clause of the trust entirely clears up what was doubtful or what was strange in the expression of the second, for the third continues thus: "And in particular it shall be in the power of the said John Costine, senior, to direct the said trustees to hold the said sum of £3,000 for behoof of the said John Costine, junior, in life rent only, and for the issue of his body in fee, and" (passing over the next part) "it shall also be in the power of the said John Costine, senior, to limit the interest of the said John Costine, junior, in the said sum of £3,000 to that of a life-rent alimentary provision, which he shall have no power to assign, and which shall not be liable to be attached by the diligence of his creditors." Your Lordships, therefore, have there an explanation of what was meant by giving to the father the faculty to limit the power and control of the son over this sum to such extent as he thought fit. It was a power which enabled him, continuing the proprietorship of the money for the benefit of the son, to limit and control the form of enjoyment by the son of that sum, so that he might secure the life interest himself, which he could not alienate, and so that

the *corpus* of the property might be preserved for the benefit of his children.

But then there continues, although it is interjected between the two sentences which I have read, the ultimate destination of the fund, when this moulding of the enjoyment for the benefit of the son and his children was accomplished. The ultimate destination is this, "whom failing" (that is, failing children) "to his nearest heirs or assignees," the ordinary words for representing the continuance in the son of the absolute right of property by a destination to his heirs or assignees. Your Lordships, therefore, have that which is an intelligent and consistent trust of the fund. It is to be the property of the son, but the father is to have the right of impressing upon it a trust giving the son a life interest and securing the *corpus* for his children; but, these objects being accomplished, the fund remains the fund of the son, as it was originally intended to be. I asked the learned counsel for the appellants (Mr. Benjamin) if the question were to be decided upon *this deed, would [237] he dispute that the ultimate destination which I have read was simply that which would express the absolute property of the son, and he very properly said in reply that he could not deny that it would be so.

Now, my Lords, I pause here for the purpose of pointing out to your Lordships that the mere reading of this trust disposes of an argument of Mr. Benjamin's which was very ably pressed upon your Lordships, namely, that you have here something analogous to what might be termed a joint power in a father and son to declare a trust of this money or a power to the son with the consent of the father to dispose of the property. No doubt, as Mr. Benjamin said, if that were the proper construction of this instrument, and if after such a trust the joint power had once been exercised by the father and the son, or if the power had been exercised by the son with the consent of the father, that being the nature of the power, such an exercise of the power could not be revoked after the death of the father. But, my Lords, there is nothing here in the slightest degree analogous to a joint power or to a power to the son, to be exercised with the consent of the father, or a power to the father to be exercised with the consent of the son. Whatever right the father has is an absolute right in him alone; whatever he can do he can do without any concurrence of the son whatever; it is a right exclusively given to the father, so far as it is given at all. And whatever right the son has is the right of the son entirely independent of the father. There is

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no junction, no connection, between the two. There is nothing which the father and the son are obliged to concur in doing. Whatever either of them can do he can do separately and independently of the other. The father can mould the mode and the form of enjoyment of the property by the son to the extent which I have mentioned, and he can do that, without any concurrence on the part of the son. So far as the father does not do that, the property remains the absolute property of the son without any right in the father to control that absolute property.

Now, my Lords, that being the bargain between the parties, that being the trust which originally was declared of this sum of £3,000 placed in the hands of these trustees, how is it that any question or confusion has arisen upon the 238] subject? If it stood *here, and nothing more had occurred, there could hardly have been an argument raised upon the question. The property would have been open to any fresh destination which the son might choose to give it, provided only that he did not interfere with what the father might do for the benefit of his issue and for the securing of the life-rent to himself. Now what took place afterwards was this; the estate was disentailed, and disentailed on the footing of this contract. The proper conveyancing deed to carry into effect what remained to be done had to be executed, and accordingly a bond and disposition in security by the father, John Costine the elder, provided that the bond and disposition of the estate to secure the £3,000 was "granted in trust," "and for the ends, uses, and purposes expressed in a deed of declaration of trusts executed by me of even date herewith, and to which reference is hereby made." And then the son, John Costine, junior, declares his concurrence and acquiescence in the above written bond and disposition in security and in the said deed of declaration of trusts." Therefore we are referred to and we have to go to the declaration of trust.

Now the declaration of trust professes to be a "declaration of trust by John Costine, of Glensone, with the concurrence of John Costine, junior, in favor of trustees." It recites the contract with regard to disentailing the estate, it recites the bond and disposition in security in favor of the trustees for the £3,000. It declares that the trustees are to hold the £3,000, in the first place to invest it in the way spoken of and to pay the life-rent to John Costine the younger, as an alimentary provision; and secondly, on the death of the son, the trustees are to hold the principal sum in trust for the issue of the son. And then the third is this: "In the

event of my said son dying without leaving lawful issue, or upon the failure of such issue, the said trustees shall hold the said sum of £3,000, or the balance thereof, if any part shall have been paid to or on account of the issue of my said son, in trust for behoof of my sister Isabella Costine, or Wightman, spouse of Robert Wightman, presently in London, in life-rent, for her life-rent use allennarly, free from" the *jus mariti* of her husband, and then for her issue, and the shares of the females are not to be subject to the *jus mariti* of their husbands.

*Now, my Lords, stopping there, I have to observe [239 that if this had been the deed of the father alone, executed without any concurrence on the part of the son, over and above the limitation of the life-rent or the limitation to the issue of the son, according to my construction of the contract between the father and the son, it would have been entirely beyond the power of the father to have made any ultimate destination of the £3,000; he would have been disposing of property which was as completely foreign to his jurisdiction as any property could be. Therefore, from any power of the father, it appears to me, this destination could receive no assistance whatever; and there, I think, the learned judges in the court below seem all to have agreed.

But there follows a declaration by the son to this effect, at the end. "And I, the said John Costine, junior, hereby declare my acquiescence and concurrence in all the provisions herein contained; and we consent to registration hereof for preservation." Now, the only question which appears to me to raise any ground for argument is, what is the effect of the concurrence of John Costine, the son, in a deed of the character of that which I have read? My Lords, it does not appear, I may say in passing, whether the aunt of the son, Mrs. Costine or Wightman, at this time was or would have been his nearest heir or not. I do not assume that either one way or the other. He himself, we are told, was a young man, unmarried, about the age of twenty-five. He declares his concurrence in what his father had done. There is no appearance whatever of any agreement, any family arrangement, any new contract, between him and his father, and that observation seems to me to put an end to one part of the argument that there was here any *jus quæsitum* of third parties. That of course could only arise if there was some agreement between the father and son for the benefit of third parties, and I find no trace of anything of that sort. It was a question of how the father should execute a power or faculty given to him. If he executed it in a proper way,

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he required no consent or concurrence of anybody else; if he executed it in a way that was not within his power, we must find some trace of a fresh agreement if that is to be set up as a fresh settlement between the father and the son.

240] *Now it seems to me that what the son, looking at this deed, had before his mind, was this: he had, by virtue of the original contract between himself and his father, a complete power of disposing of this £3,000, subject to the life interest in himself and to the interest to be secured for his children. He was an unmarried man, and at his age it might appear to him that that was a right which might never become one of much practical importance; but as it stood upon the original contract, the destination would have been to his heirs and assignees generally. It appears to me that in this deed he does nothing more than allow, for the time and provisionally, the nomination of assignees under his original right of property. That is an intelligible arrangement to be made. He knew the members of his family at the time, and he would naturally be perfectly prepared to permit the insertion of their names in place of the general destination which stood in the original contract. But I can find no trace here of his intending to do anything more than to allow the insertion of the particular names of members of his family, in place of the general destination in the original contract. That is only stating in other words that this was a revocable nomination of assignees, that it was, as one of the learned judges calls it, testamentary in its nature, which is only another term for saying that it is revocable in its nature. I can find no trace of anything whatever done or said on the part of the son, which was intended to give this a different character, or to elevate it to the position of an agreement made between him and his father, for the benefit of those particular persons whose names were thus inserted in the declaration of trust.

My Lords, I therefore ask your Lordships to dispose of this case upon the explanation, which seems to me to be the sound and proper one, of these documents which I have endeavored to give. That is the explanation which found favor with the majority of the Court of Session, and it seems to me entirely sufficient to uphold the judgment at which they have arrived. I will therefore move your Lordships that the appeal should be dismissed, and, as there is no agreement between the parties as to costs, it must be dismissed with costs in the usual way.

241] *LORD HATHERLEY: My Lords, I am of the same opinion as that expressed by my noble and learned friend

on the woolsack. I proceed entirely upon this ground. The instrument which must regulate the rights of the parties is the first instrument dated the 20th of October, 1870, which is an agreement stating upon what terms the son had come in and consented to the destruction of the estate tail of which the father was in possession.

My noble and learned friend on the woolsack has gone through that agreement with a view to showing the position of the parties, and I shall not therefore cite the passages again. I will simply state that the son's consent was given upon a bond of £4,000, unfettered by conditions, and upon a bond of £3,000 which was fettered by the conditions contained in the deed. What were those conditions? In the first place, the sum of £3,000 is to be held "in trust for the use and behoof of the said John Costine, junior," that is the son. That would have given him the absolute interest in it, but for the control vested by the subsequent words in the father. "It shall be lawful for the said John Costine, senior, to limit the power and control of the said John Costine, junior, over the said sum, to such extent and in such way and manner as he shall think proper." Therefore, the whole sum of £3,000 placed in the hands of the trustees stood in this position, that the father had power to control it in this manner, that is to say, he could direct them to hold the £3,000, for the behoof of his son, "in life-rent only and for the issue of his body in fee, whom failing, to his nearest heirs or assignees." But there is not a single word in that agreement giving the father the power of destination over the sum, on his own authority. He could guard the son's interest, he could watch over those interests, he could take care in the first place, by reducing it to a life interest, that the son should not dispose as he (the father) might think unadvisedly of the capital. And besides having the power of saying that he should only have a life interest, he might further limit the interest to "a life-rent alimentary provision." That is a further restriction which the father might put upon the son's life interest. But my Lords I look in vain in the instrument for *anything what- [242 ever which approaches to a power or authority being vested in the father himself, to deal with the sum which he had parted with, and which he had handed over to the trustees, that sum being part of the consideration which the son had been paid for barring the entail, and which was the son's to all intents and purposes; for although the father might give directions as to the mode in which it should be enjoyed by

the son, and might preserve it for his issue, he had no controlling power over the fund itself.

Mr. Benjamin felt the difficulty undoubtedly that arose upon the wording of the deed in the way of his argument as to the father having the power to do anything like what he has here done, and he adopted I think I may say the reasoning of Lord Curriehill, which puts the case as strongly as it can be put for the appellants. He contended that an interpretation was put upon this agreement by a deed which was subsequently executed, and which asserted, as has been said on the part of the father, apparently by the exercise of the nomination of the aunt, a right to control the destination of the fund. Lord Curriehill puts the result of that with reference to the subsequent deed thus. He says: "These are questions which it might have been difficult to answer had the deed of declaration of trusts and the other deeds referred to in the interlocutor not been granted. But I think that by these deeds, and particularly by the deed of declaration of trusts, to which John Costine, junior, was a party and gave his full and deliberate consent, he and his father have virtually interpreted the second head of the minute of agreement as conferring upon or as reserving to the father full power, failing issue of his son, to deal with the fee of the £3,000 as he should deem right" (1). Therefore, says Mr. Benjamin, it is in effect a power given to the father to deal with the fund, and that power he has exercised, and the son has not only not opposed his exercising that power, but has concurred in his so doing. If it was of any important use in this controversy, nothing short of this must be contended, that enabled the father in effect to revoke the gift of £3,000 in favor of the son, and to revoke it [243] from his issue, and to say that *not only the life-rent but the capital itself shall be at the disposition of the father.

Now, my Lords, if there had been any great difficulty in the construction of that first part of the clause I have read as to the £3,000, if there had been any question, looking to the framing of the deed itself, as to whether there was or was not in the deed a power conferred upon the father, I think it would at least not be increased by those deeds which were subsequently executed by the son, and which are viewed by Lord Curriehill as giving a meaning to the agreement which certainly on the face of them the words do not indicate. Regard being had to the position of the parties, they do not occasion in my mind any doubt or difficulty. Lord Curriehill looks upon them as a concurrence by the

(1) Court Sess. Cas., 4th Series, vol. v, p. 786.

son, and a giving to the father that which he had not according to the interpretation of the words themselves in the original agreement which was entered into between the parties. I do not find any trace of such an intention. I do not find that the father and the son recited the agreement as being of a doubtful or ambiguous character, or recited that questions had arisen between the two, and therefore an arrangement had been come to between the father and the son that the interpretation should be such as, on the face of it, the words did not appear to bear. I find nothing of that sort. It only comes to this—there is a declaration of trusts which proceeds in consequence of the agreement; the father recites the declaration of trusts, and he says, “Considering that by minute of agreement, dated the 17th and 20th days of October, 1870, entered into between me on the one part and the said John Costine, junior, on the other part, I bound myself, in consideration of the said John Costine, junior, having consented to the said estate being disentailed, *inter alia*, to pay to certain trustees for his behoof, at the first term of Whitsunday or Martinmas that should happen after the said disentail had been completed, the sum of £3,000 sterling.” There is nothing there to say that there had been any difficulty or any ambiguity which occasioned the necessity for this deed of declaration of trusts. The deed is executed evidently for the purpose of carrying out that agreement which had been come to between the parties in 1870.

*I do not know why it was, or whether there was [244 any special intention in the matter, but it does leave out the limitation after the failure of issue which is contained in the original agreement, “whom failing to him, and his nearest heirs or assignees.” Those words are certainly omitted in the recital in the deed of declaration of trusts, but I do not think that anything turns upon that. It is rather singular that those words should have been omitted in the recital of the limitation; but be the reason what it may, I find nothing whatever that indicates that either the father or the son thought in the slightest degree of varying the agreement or of doing otherwise than carrying it into full effect.

And if the agreement was to be carried into full effect, then I think the case is clearly brought to what the Lord Justice Clerk and Lord Gifford consider the true construction of the whole agreement, namely, that the £3,000 was the son's fund, given to him as part of the consideration for his agreeing with his father to bar the entail; it remains the fund of the son, subject only to such power and control as

the father might have over it in the way of arresting alienations of a certain character, as to which nothing need be said, nothing of the kind took place; but the agreement did not give the father the power to dispose of the fund, nor does it appear to me that the son's concurrence in the subsequent deed is given for the purpose of enlarging the authority of the father, or of parting with the control over the fund to the father and enabling him to hand it over to the aunt. The effect of it appears to me to be simply this. The son had this control over the property guarded in the way I have indicated, and that son said (this is the legal effect of it in my mind), that out of his moneys he was willing at that time that the capital at his death should pass over to the person indicated in the deed. But then, as regards that, it was entirely a voluntary disposition; there was no bargain between the father and the son that that should be the case. They having previously agreed to bar the entail, there was no new bargain entered into at that time of this kind: "You shall also agree with me to give a certain sum of money in this way." If it had been so, the cases which have been cited might have had some application, but that was not the case. I do not see that *they intended to agree to anything of the kind in 1871. I think that the deed of declaration of trusts left the parties in exactly the position in which the original agreement left them, and that left the property in trust for the use and behoof of the son, which he was at that time minded to dispose of in a certain way; but the deed being entirely without onerous consideration, it left him full power to dispose of the property by a testamentary act afterwards, and that power he exercised by testamentary disposition.

LORD SELBORNE: My Lords, the recital of the agreement between the father and the son, in this deed of trust, is imperfect, and might not, impossibly, be misleading. If the agreement had been in those terms, and in those only, it would (according to the opinions of the Lord Ordinary and Lord Ormisdale), have justified the father in dictating, at his own mere will and pleasure, the succession to this sum of £3,000 after the son's death. But that sum really belonged to the son absolutely, and would necessarily be part of his *post mortem* succession (failing his issue) after his death; and the father's power of control really extended no farther than to the restriction of the manner in which the son's life interest was to be enjoyed, and to securing the succession of his issue, if issue he should have.

When the deed of trust was executed there was no new

bargain, and no new consideration. The son could not possibly be bound by any erroneous interpretation which that deed might have put upon the original contract, so as substantially to vary its operation and effect (if it ought to be so understood), either on the principle of estoppel, or on any other; unless there were some new bargain or new consideration. That deed, in all its material provisions, was the deed of the father, speaking in the first person singular, and purported to operate by virtue of his power of control. There were no dispositive or conveying words on the part of the son; he merely acceded to the deed, and declared his acquiescence and concurrence. This could, at the utmost, amount to no more, than the expression of his will, at that time, that his *post mortem* succession, as to this fund, should go in the order and course declared by that deed. Such a mere expression of his will was, at the most, testamentary and revocable, and it was duly revoked.

*I agree, therefore, with the view of this case [246 taken by the Lord Justice Clerk and Lord Gifford; and with the reasons for their decision, which are clearly and ably explained in Lord Gifford's judgment ('').

Interlocutors appealed against affirmed, and appeal dismissed, with costs.

Lords' Journals, March 20, 1879.

Agent for appellants: *A. Beveridge.*

Agents for respondent: *Simson, Wakeford & Simson.*

(') Court Sess. Cas., 4th Series, vol. v, p. 791.

The question as to when, and under what circumstances, a trust is created which the donor may revoke or which the *cestui que trust* can enforce, has frequently arisen: see 13 Amer. Law Reg. (N.S.), 349 note.

Although a court of chancery will not lend its aid to complete a voluntary agreement establishing a trust, nor hold it binding and obligatory while it is executory, yet, if it is executed, although voluntary and without consideration, it will be sustained and enforced in all its provisions: *Padfield v. Padfield*, 72 Ills., 323.

A court of equity will execute a trust where there is a valuable consideration: *Carhart's Appeal*, 78 Penn. St. R., 100.

But if it be voluntary, the legal estate must be put out of the settlor: the question as to its validity being

whether it was at first created: *Carhart's Appeal*, 78 Penn. St. R., 100.

In general, a court of equity will not execute unexecuted voluntary contracts *inter vivos*, but will leave parties to their remedies at law: *Carhart's Appeal*, 78 Penn. St. R., 100.

Where a deed, executed by the grantor to his brother, was given in contemplation of an arrangement which was afterwards voluntarily abandoned by the parties, but being left with the grantor's counsel, was, without ever having been delivered, or any consideration paid, put on record by him by mistake, and the widow and heirs of the grantee, after his death, insisted that the deed was valid, and claimed to hold the premises under and by virtue thereof; held, that such claim was most inequitable, and the deed was declared null and void, and an entry di-

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rected to be made upon the record, stating that such deed was annulled by the judgment of the court: *Russell v. Russell*, 50 Barb., 445.

An agreement for the creation of a voluntary trust, so long as it remains executory, will not be regarded as binding in equity; but where there is a voluntary gift or conveyance of property in trust, and nothing remains to be done by the donor or grantor to complete the transfer of the title, the relation of trustee and *cestui que trust* is established, and the equitable rights and interests growing out of the gift or conveyance, though made without consideration, will be recognized and enforced in chancery, except as against creditors and *bona fide* purchasers without notice: *Padfield v. Padfield*, 68 Ills., 210.

In determining whether a trust is an executed or only an executory one, the intention of the parties at the time of creating it is an important and controlling element, and equity, discarding unmeaning and useless forms will look to the substance of the act done and the intention with which it was done, and carry out that intention: *Padfield v. Padfield*, 72 Ills., 322.

Where a father deposited his earnings in a savings bank, in his own name, as trustee for his children severally, in sums to draw the largest interest, but under circumstances which make it clear that he did not intend thereby to part with his ownership of, or interest in, the moneys, or the right to control the same:

Held, that no such trust was created by such deposit, in favor of the children, as would enable them to take the same from the control of their father.

Also, that whether a trust was created was a question of fact, in determining which, the court would give effect to the purposes and objects which the settlor had in view in making the deposits: *Weber v. Weber*, 58 How. Pr., 255.

A voluntary deed of trust, reserving no power of revocation, made with a nominal consideration and without legal advice as to its effect, and where there was evidence that its effect was misunderstood by the grantor, was set aside and a reconveyance ordered. The fact that the grantor's infant children

were the beneficiaries under the trust deed was not sufficient to prevent the relief: *Garnsey v. Mundy*, 24 N. J. Eq., 243, 13 Amer. Law Reg. (N.S.), 345 note.

A. made a voluntary settlement in trust for his own benefit during life, remainder to his devisees and legatees, and in case of intestacy, to his heirs at law. The settlement contained no power of revocation, but both A. and the trustee supposed it to be revocable by A. On a bill in equity brought by A. against the trustee asking for a reconveyance of the trust property; held, that the relief asked for should be granted. Held, further, that where in an instrument like the one in question no deliberate intention appears to make it irrevocable, the omission of a power of revocation is *prima facie* evidence of a mistake: *Aylsworth v. Whitcomb*, 12 R. I., 298.

Though a trust be voluntary, or a gift if it be delivered, even to a third person for the *cestui que trust*, it is valid and cannot be revoked by the settlor, and if *bona fide*, is good as against his subsequent creditors: *Brown v. Austen*, 35 Barb., 341, 22 How. Pr., 394.

A deed of real estate deposited with a third person, to be delivered to the grantee on payment of notes executed by the grantees in consideration of the conveyance, operates as an escrow: and the conveyance thereof by the grantee, or sale under execution against him, prior to the delivery of the deed, is inoperative: *Ober v. Pendleton*, 30 Ark., 61.

Where a parent, in order to make provision for several children, executed a deed of real and personal property in favor of his two sons, and deposited the same as an escrow to be delivered on payment by the grantees of certain notes executed by them to other children of the grantor for their portions, it was held that those notes constituted a charge on the land, enforceable in equity: *Ober v. Pendleton*, 30 Ark., 61.

A widower, on his second marriage, executed a settlement which made provision for his children by his first marriage. Held, that the provision could not be defeated by a sale for value, by the settlor: *McGregor v. Rapelye*, 17 Grant's (U.C.) Chy., 38, affirmed 18 id., 446.

A trust once absolutely created by

the act of the settlor is irrevocable as to him, even though the beneficiaries may have had no notice of its existence.

In order to sustain a trust, it must be shown that a complete and valid delivery of the subject thereof has been made, and that no power is left in the settlor to revoke or annul such delivery, or to defeat its effect by making any other or different disposition of the property: *Meiggs v. Meiggs*, 15 Hun, 453.

A., by an agreement, disposed of all his real estate to one B., his son-in-law, who agreed to pay to A. an annuity for life, and after A.'s death to pay the purchase-money in equal annual instalments to A.'s daughters. A., by his will, made some years thereafter, assumed to grant a legacy to his wife out of the real estate, directing the same to be deducted from the payments to be made to his daughters: Held, that the agreement was complete, and the proceeds of the realty could not therefore be charged: *Honsberger v. Marten*, 8 Grant's Chy., 361.

The title of a trustee under a deed of trust is complete and irrevocable by the settlor, although the transaction be purely voluntary. Nor does the fact that the grantor reserved an interest during life in the proceeds of the property, and gave a future benefit to other persons named, give an implied right to revocation. It contravenes no rule or policy of law, but executes the intention of the grantor: *Fellow's Appeal*, 93 Penn. St. R., 470, distinguishing *Frederick's Appeal*, 52 id., 336.

Where a party makes another trustee of notes indorsed and delivered by her to him, not only for her own benefit, but also for the benefit of the makers of the notes, the trustee being one, she cannot revoke the same, nor will a court of equity revoke the same, where no abuse of the trust is shown, and it is a perfectly created one: *Light v. Scott*, 88 Ills., 239.

Where a woman, in contemplation of marriage, indorsed certain notes held by her, on her children, to one son, and by a separate instrument in writing declared him to be her attorney and trustee to retain the custody and complete control of such notes, and directed him to keep the same, and whenever, in his judgment, her wants required the in-

terest on the notes, or any part thereof, that he collect, in equal amounts, from the makers, whatever sum was necessary for her wants, and pay the same to her, and, upon her death, to return the notes to the makers; it was held that the instrument was not only a power of attorney, but also created a complete trust, which she could not revoke at pleasure, and that it made the son not only trustee for her own benefit, but also for the benefit of the makers of the notes: *Light v. Scott*, 88 Ills., 239.

The plaintiff in 1857, in contemplation of marriage, gave her property by a trust deed to trustees to pay her the income for life, with a provision for her husband if he survived her, but if she survived, the property was to go to such person or persons as she might by will direct, and in default of a devise by her it was to descend to her heirs. The plaintiff survived her husband and re-married; and subsequently, in 1872, the trust property was re-conveyed to her by the surviving trustee under the provisions of the act of 1849. Held (in an action for the partition of some of this property which plaintiff held as tenant in common with one of the defendants), that plaintiff, by the trust deed, divested herself of all her estate, in the property, and that she cannot recall the trust; that the supreme court, before the act of 1849, had not power to destroy such trust, and said act did not give authority for its extinguishment, the purpose of the act being to enable trustees, after the act of 1848 had freed married women from their peculiar disabilities, to re-convey to the beneficiaries, trusts created prior to that act, for the benefit of women contemplating marriage: *Thebaud v. Schermerhorn*, 61 How., 200.

The insurance company, defendant, in October, 1877, transferred to the trust company, defendant, two mortgages as security to the holders of policies in the insurance company, the latter company to collect and retain for its own use the interest upon the mortgages. The trust company was, at the request of the insurance company, to foreclose the mortgages in its own name, on being indemnified for costs and expenses, and to hold the proceeds for the protection of the policy holders. In September, 1878, the insurance company made an assignment for the ben-

effit of creditors, and at the request of the assignee the mortgages were delivered to plaintiffs for foreclosure, as attorneys of the trust company, the plaintiffs giving a receipt stating that the proceeds, after deducting the interest which had accrued upon the securities, and the costs and expenses, were to be deposited with the trust company as security for the holders of the policies. There was \$13,800 of interest due upon one of the mortgages at the time of the foreclosure, and \$1,200 upon the other, while the foreclosure sale produced but \$5,000 upon one mortgage and \$1,000 upon the other. In this action, to determine whether this \$6,000, less expenses, should be paid to the assignee or to the trust company, and whether the plaintiffs have a lien for services to the assignee:

Held, that, as against the trust company, whose attorneys they are, the plaintiffs are not entitled to hold possession of the fund, after receiving their taxable costs and allowances; and also that, as the agreement under which the trust company received the mortgages created a trust, by which the policy holders of the insurance company were to be secured, the securities and their proceeds became irrevocably impressed with that trust, and the trust company is, therefore, entitled to such proceeds as against the assignee of the insurance company, and this notwithstanding the provision in regard to the receipt and collection of interest by the insurance company: *Fullerton v. National, etc.*, 63 How., 5.

Defendants' father and mother conveyed their farm to him, and at the same time he gave them a bond, conditioned for their support, and for the payment of \$400 to his sister on a certain day, and executed a mortgage on the farm to secure the performance of the condition of the bond. Held, a trust in defendant as to the \$400 sufficiently created and declared to answer the requirements of the statute. Held also, that said trust was not revocable without the consent of the *cestui que trust*: *Barber v. Thompson*, 49 Verm., 213.

Three years after marriage a husband had executed and delivered a trust deed for behoof of his wife and children, if any should be born of the marriage. Four years thereafter, when there were no children, the truster and his wife

desired to terminate the trust and have the proceeds realized: Held, that the trustees were not so entitled to pay the funds over to him on his and his wife's joint requisition, although there was no issue of the marriage, and that the same rule applied as if the deed had been ante-nuptial:

Question, whether the decision would have been the same in a case where there was no likelihood of children of the marriage: *Low and others*, 15 Scottish L. Repr., 111.

A deed of separation between husband and wife, where the estate is conveyed to the wife for life with remainder to the children of the marriage on her death, is not avoided by the subsequent reconciliation of the parties, as the interest of the children intervene to preserve the deed: *McArthur v. Webb*, 21 U. C. C. Pl., 358.

A husband created a trust for the purpose of providing "a comfortable support and maintenance for his wife," who was then under guardianship as an insane person. The wife afterwards was discharged from guardianship and the trustee paid over the trust fund to the husband, who subsequently furnished the wife with support and maintenance. Held, that the trust continued notwithstanding the discharge of the wife from guardianship; but that the husband was entitled to retain from the accrued income of the trust fund the amount expended by him for the support of his wife: *Scott v. Rand*, 118 Mass., 215; S. C., former appeal, 115 id., 104.

Where a father assigned and transferred to his son a large number of notes for a considerable sum of money, in consideration of the son's undertaking to pay \$2,000 per annum during the father's life for his support, and under an agreement that the son was to collect such notes, and, after deducting from the proceeds the amount paid his father with interest, was to pay to two other parties, after the father's death, two-thirds of the remainder, according to the last will of the father: Held, on bill by the father against the son for an account and the surrender of the uncollected notes, that a trust was established as to two-thirds of the proceeds of the notes after deducting what might be paid to the father, which was binding upon the parties, and that the

cestui que trust took a vested interest in the gift, liable to be affected by the exercise of the testamentary power by the donor; and that as the trust was coupled with an interest in the son to reimburse himself for his liability to the father, he was entitled to retain the property until the death of the father, in the absence of any abuse of trust on his part: *Padfield v. Padfield*, 68 Ills., 210.

Where a party places property in the hands of a trustee for the use of his children, to be, as directed, disposed of by a will executed by him at the same time, the trust will be executed in accordance with such will, notwithstanding the will may be revoked and another one executed. The right of the party to make another will is not affected by such trust, but the right to dispose of or change the terms of an executed trust by will does not exist: *Padfield v. Padfield*, 72 Ills., 322.

A father transferred to his son a large amount of notes and other securities, and took from him an agreement to pay \$2,000 per annum for his father's support during his life, and to pay to certain parties named two-thirds of the proceeds of such notes and securities upon the death of the father, for the use of a brother and sister named, which amount so paid to such trustees they were to dispose of as directed by the last will and testament of the father. At the same time, and as a part of the same transaction, the father executed his last will and testament, and it and the son's agreement were all placed in the hands of one of the trustees named for safe keeping. It appeared from oral testimony that the intention of the father at the time was to divide the notes and securities equally between his three children: Held, that the trust created by the agreement between the father and son was an executed one, and that the two-thirds to be paid by the trustees named was to be disposed of by them as directed by the will of the father made at that time, and that he had no power to change or otherwise dispose of the property by a subsequent will: *Padfield v. Padfield*, 72 Ills., 322.

A disposition of property to take effect after the grantor's death, is testamentary and therefore revocable.

A power coupled with an interest

cannot be revoked by the person granting it, but it is revoked by his death, for a valid act cannot be done in the name of a dead man.

A grantor reciting that in consequence of disadvantageous bargains, being old and feeble, having met with losses and being in debt, he was so troubled in mind as to be incapable to attend properly to business; fearing that his affairs would fall into confusion and he lose his estate, to save himself from care and trouble and further loss and destruction of property, conveyed all his estate to trustees to pay his debts and necessary expenses, support him for life, they submitting an account to him every year, and after his death divide the balance amongst all his children. Held, that this was a revocable grant.

The grantor afterwards executed a deed revoking the grant. Held, that by the exercise of their powers by the trustees before the revocation, valid rights vested, and the titles they conveyed could not be questioned.

As to the children named in the grant, the deed being founded on no consideration from the trustees, and being simply to promote the grantor's convenience and interests, it was at most a covenant for posthumous gifts, and as such *nudum pactum*: *Frederick's Appeal*, 52 Penn. St. R., 338.

A person *qui juris* conveyed his property by voluntary deed to his mother, upon a recital that his habits were such as to disqualify him from managing his property in a prudent and discreet manner, and that the income was sufficient for his support, in trust to permit him to receive the annual income arising therefrom during his life, and at his death the same to be at the absolute disposal of his mother, "or to those who would be entitled to the same under the statute of distributions from her." Some years afterwards, the mother, on her death-bed, reconveyed the property to her son:

Held, that he took a good title. *Moore v. Walker*, 3 Lea (Penn.), 656.

Parties claiming as *cestui que trustent* under a deed of trust not completed by delivery, alleged in their bill filed to declare, and for the enforcing of the trusts, that the deed creating the trust, if any, was not executed by or assented to by the persons therein appointed

trustees; that the contents of the deed were never communicated to them by the grantors; that when the contents were afterwards communicated, the trustees so appointed expressly renounced and refused to execute the trusts therein contained. The plaintiffs were volunteers. Held, on demurrer, that no interest passed by the deed, but that it was void: *Smith v. Stuart*, 12 Grant's Ch., 246.

An agent delivered property of his principal to a third person, taking a receipt therefor, in which, without authority from the principal, it was stated that it was to be held in trust for the principal's children. The intention of the principal was, that such property should be held for his children only in the event of his encountering a threatening pecuniary disaster, and he intended still to retain a power over it.

Held, that the principal might recover such property in an action brought by him against the person to whom it was so delivered: *Meiggs v. Meiggs*, 15 Hun, 453.

A father conveyed certain land to a daughter, she agreeing, as part of the consideration for the conveyance, to support and provide with medical attendance a son who was insane. Subsequently, the daughter reconveyed the property to the father, and he again conveyed it to her by a deed containing no clause by which the support of the son was charged upon her.

In an action, by the overseer of the poor of the town, to set aside this conveyance as fraudulent, as being intended to impose upon the town the burden of supporting the son, held that the action could not be maintained: *Bowlsby v. Tompkins*, 18 Hun, 219.

One Benham conveyed certain real estate to one Pennock, and took back a purchase-money mortgage for \$2,800, as to \$1,400 of which it was provided that, as Benham's wife had refused to join in the deed, it should be set apart as an indemnity against her claim of dower, the interest to be paid to Benham during his life, and in case he survived his wife, the principal to be paid to him or his heirs, executors or administrators; in case she survived him, the interest to be paid to her during her life if she elected to receive it instead of claiming her dower; and if not, thereon interest to be paid until her death, but

the principal to be paid within twelve months thereafter to the heirs, executors or administrators of Benham. Benham assigned the mortgage, and the same was paid, and by the assignee satisfied of record. The wife survived the husband and elected to take the interest of \$1,400, instead of her dower. After her death, the administrator of Benham brought this action, claiming that Benham had no right to assign the mortgage; that the \$1,400 therein reserved was made a trust fund for the benefit of Benham's heirs, and that the payment to the assignee did not satisfy the same.

Held, that the assignment by Benham was valid, and that the payment to the assignee satisfied and discharged the mortgage: *Benham v. Pennock*, 18 Hun, 103.

A lady having eight days previous to marriage, but (in the opinion of the majority of the court) not in view thereof, executed a trust deed, dealing with funds over which she had absolute control, by which the income of her estate was to go to herself and the fee to her children if she had any, and any husband she might marry was strictly excluded from both interest and principal. Afterwards upon her marriage, and previous to the birth of any child, desired to execute a renunciation of the trust to the extent of making a provision for her husband. She brought an action (in which her husband sued along with her) against the trustees for declarator; (1), that the deed of trust was revocable, or (2), that notwithstanding of that deed she was entitled "to execute a reasonable post-nuptial contract" making provision for her husband. A child was subsequently born of the marriage.

The court (after a report by a curator *ad litem* to the pursuer approving of the course desired) (*dub.* Lord Gifford) gave effect to the second conclusion of the summons, the deed having been when executed perfectly gratuitous, and no *jus crediti* having in their opinion been created in any one.

Opinion (per Lord Justice Clerk), in the view of the fact that the deed partook of the nature of a voluntary interdiction rather than of any other, that the prior birth of a child would not have barred revocation; and (2), that if the deed were truly irrevocable,

there would have been no propriety or expediency in the court interfering with it upon a subsequent marriage.

Opinion (per Lord Gifford), (1), that the deed, judging from the facts of the case, must be held to have been executed *intuitu matrimonii*, and that upon marriage it became irrevocable; and (2), that it was inexpedient for the court to interfere to the effect of sanctioning the proposed post-nuptial deed: *Mackenzie v. Mackenzie*, 15 Scot. L. Repr., 690.

F., a child of tender age, was adopted with the consent of his parents by L., a stranger to him in blood, who promised the parents to adopt and provide for the child.

L., by deed, expressed to be made between himself of the one part and T. and J. of the other part, but executed by himself alone, purported, in consideration of natural love and affection towards F., to assign to T. and J. £5,000 invested in railway debenture stock, to hold from L.'s death upon trust to apply the income of the said sum for the education, maintenance and benefit of F. till he, F., should attain twenty-one, and then upon trust to assign to F. the said sum with all accumulations thereon. The deed was not registered as a transfer of the stock, and the stock remained standing in L.'s name till his death.

In a suit by the personal representatives of L. for the administration of his estate, and seeking a declaration that the stock, which was claimed by T. and J. formed part of it, the court being of opinion, on the evidence, that there had been no change in the status of F. which would have rendered it inequitable on the part of L., or those claiming under him, to refuse to carry out the provisions of the deed:

Held, that the deed as a voluntary instrument could not be deemed operative as a declaration of trust, and that, as a gift, it must fail as imperfect and incomplete, unless T. and J. could compel the railway company to register the deed as a transfer of the debenture stock, pursuant to the 8 Vict. c. 16; and the company not being parties to the suit, the court allowed T. and J. reasonable time to institute proceedings for that purpose, if so advised: *L. R.*, 9 Ireland, 121.

The simple avowal by a purchaser

at sheriff's sale, whether made at the time of the purchase or afterward, that the purchase was for another, will not support the allegation of a trust.

Power signed a paper stating that if he purchased lands about to be sold by the sheriff, he would hold them on specified trusts for creditors of the defendant in the execution: after his purchase of the land, held, under the circumstances of the case, not to create a trust in Power: *Carhart's Appeal*, 78 Penn. St. R., 100.

Where a husband gave real property to his wife and children, using this expression in the deed of conveyance, "Laura E. Mabry and her children:" Held, that this being a continuing trust, these words refer to all persons who may answer the description of the children of their marriage during the existence of the trust, and that such children of the marriage, as well those now born as those hereafter to be born, take an interest in the estate: *Rogsdale v. Marly*, 8 Baxt. (Tenn.), 300.

If A. puts property in trust, the income to be paid to him for life, and after his death to his wife for life, and the principal, after the death of both, to his executor to be divided equally among his children, and A. retains no power of revocation or further disposition, it does not pass by his will or by an assignment executed by one of his children by which he conveys, after his father's death, "all my interest of whatever name, nature or description in the estate real and personal of my father, and all my share thereof under the will of my father, together with all income, benefit and advantage thereof accrued or to accrue:" *Belknap v. Belknap*, 128 Mass., 14.

A. in 1842 conveyed to B.'s son, then a minor. This deed was never registered. B. swore that he bought the land from A., but being in difficulty, had the deed made to his son; that he had always continued in possession, but on this point the evidence was contradictory. A.'s heir in 1849 made a deed of release to B., and B. conveyed to lessors of plaintiff: both these deeds were registered.

Held, 1st, that the mere fact of B. being in possession when he conveyed to the lessors of the plaintiff, could not be relied on as *prima facie* evidence of seisin after A. had been shown to have

been in possession previously, and to have conveyed to B.'s son. Held, also, that there being no evidence that the deed from A.'s heir to B. was for valuable consideration, B. could not displace his son by reason of the prior registry of that deed; and, for the same reason, the lessors of the plaintiff could not claim to be preferred. But held also, that the deed from A.'s heir to B. being a mere release, and (if B.'s son were in possession), there being no estate on which it could take effect, was inoperative: *Prince v. Girty*, 9 Upper Can. Q. B., 41.

Where a husband directed, by writing, certain persons to hold moneys in trust, to pay the interest to his wife for life, and such directions were acted upon and payments made accordingly, held, that the husband could not afterwards revoke such directions and sue the trustees for the money: *Cowper v. Plaisted*, 5 Wyatt, Webb & A'B. (Law), 88.

Where the regulations of a beneficiary society prescribe a certain form in which money is to be paid to the beneficiary, in making a new direction as to its payment, this form must be followed, and the disposition of it cannot be changed by will: *Vollman's Appeal*, 92 Penn. St. R., 50.

Where a husband or father takes a policy in the name of his wife and children, intending to give her or them the benefit of it, the wife and children thereby acquire a vested interest, of which he cannot afterwards deprive them:

Illinois: *Glauz v. Gloeckler*, 14 Chicago Leg. News, 200, 10 Bradw., 484, affirmed 16 Cent. L. J., 268.

Indiana: *Pence v. Makepeace*, 65 Ind., 345.

Iowa: *McClure v. Johnson*, 56 Iowa, 620, 10 N. W. Repr., 217.

Kentucky: *Robinson v. Duvall*, 18 Chicago Leg. News, 417, 6 Cinn. Law Bull., 611.

Michigan: *Crittenden v. Phoenix*, etc., 41 Mich., 442.

Minnesota: *Allis v. Ware*, 28 Minn., 166, 9 N. W. Repr., 666; *Reiker v. Charter Oak*, etc., 27 id., 193.

New York: *Brunner v. Cohen*, 86 N. Y., 11; *Fowler v. Butterly*, 78 id., 68, affirming 40 N. Y. Super. Ct. R., 148; *Lockwood v. Bishop*, 51 How. Pr., 221.

Pennsylvania: *Folmer's Appeal*, 87 Penn. St. R., 133; *Vollman's Appeal*, 92 id., 50; *Estate of Hardy*, 12 Philadelphia R., 29.

Tennessee: *Gorsling v. Caldwell*, 1 Lea, 454.

Wisconsin: In this State the courts hold the person obtaining the policy payable to another may, notwithstanding, dispose of it, but if he do not, the appointee takes: *Foster v. Gile*, 50 Wisc., 608; *Ballou v. Gile*, id., 614.

The same rule would apply where he voluntarily assigned, by an executed contract, a policy taken out payable to himself: *Tennessee v. Ladd*, 5 Lea, 721; *Fortescue v. Burnett*, 8 Myl. & K., 36.

By a life insurance policy in the name of a wife on the life of a husband, the amount of the policy was payable to the wife, her executors, administrators or assigns, if she survived her husband; otherwise, to their children for their use or to their guardian, if under age. The wife did not survive her husband. Held, that the children were the sole beneficiaries, and the policy became payable to them:

Maine: *Martin v. Aetna*, etc., 73 Maine, 25.

In such a case, where a child by adoption is the only child, and is of age, and the circumstances show that the parties intended that he should be included in the benefits of the policy, he is entitled to all the proceeds of the policy, and an action upon it should be in his name: *Martin v. Aetna*, etc., 73 Maine, 25.

Where a person who insured his life for the benefit of his wife and children, surrendered the policies, after the death of his wife, signing as guardian for his children, though all but one of the children had arrived at full age; held, that surrenders were void and the children, who, until their father's death, were ignorant of the existence of the policies, became entitled at his death to the full amount named in them, less the amount of premiums which accrued since the surrenders: *Whitehead v. New York Life*, etc., 21 N. Y. Daily Register, 1185, Van Vorst, J.

If a person insures his life for the benefit of another, who is named as the beneficiary in the policy of insurance, the title of the beneficiary to the insurance money is vested immediately upon the issuing of the policy, and there is no power in the person procuring the

insurance to defeat that title by assigning or surrendering the policy.

Although there is no obligation upon the person procuring the insurance, in the absence of any covenant to that effect, to continue to pay the premiums on such policy, yet if he does so, the benefit will accrue to the beneficiary: *Valley Mutual Life v. Burke*, 7 Virg. L. J., 173.

Where a father procured a policy of insurance upon his own life for the benefit of his infant daughter, which was in express terms made payable upon his decease to her, her executors, etc., and paid all the premiums thereon out of his own funds, making no charge of the same against her, and retaining the custody of the policy; held, that the contract of the insurance company was with the daughter, and upon her death the legal title in the contract vested in her legal representatives, and that the father was not legally entitled to the possession of the policy, and that the administrator of the deceased daughter was entitled to an order for its surrender to him: *Glaux v. Gloeckler*, 16 Cent. L. J., 268.

A gift of an insurance policy to be exchanged by the donor's assent for one drawn according to the donee's wishes, is sufficiently consummated by delivery when the policy is given to the donee, and then returned to be forwarded, by the assent of all and the donor's order, to the insurance company to be exchanged, and is exchanged accordingly without any intervening objection by the donor.

A father took out a policy of insurance in his own favor on the life of his minor son, to whom he promised to give the policy at his majority. The son having married, asked that it be given him before that time and made payable to his wife, and the father, acquiescing, delivered it to him. It was afterward returned to the father in order that he might have it changed so as to run to the wife, and he forwarded it through the local agent, with the request that it be changed accordingly. The company substituted a policy drawn in the wife's favor and sent it to the local agent, who received it on or about the day the assured died, and afterwards delivered it to the father, who retained it and filed a bill to enjoin the company from paying it to the wife. Held, that the gift of the

insurance was perfected by the delivery of the policy, the order for substitution and the subsequent transfer by the company without objection; and that the bill would not lie: *Crittenden v. Phoenix Life Ins. Co.*, 41 Mich., 442.

The constitution of a relief association provided that "this association shall have for its object the payment to the family of the deceased member of so many dollars as there are members of the association;" and further, that the assessment "shall be paid to his legal representatives, or to such person or persons as he may have designated or appointed in writing. Provided always, that when such member shall leave a widow or children, he shall have no power to deprive her or them of the benefits specified in this article, by will or otherwise, but the same shall be paid to her or them absolutely." The application of the assured was made in favor of a niece with whose family he was living, but at the time of his death he had a married daughter living apart and independent of him. The court below awarded the fund arising from the assessment to the daughter.

Held, that it should have been awarded to the niece, as the acceptance of the application by the association was a contract on its part to pay the money to the niece on the death of the assured: *Folmer's Appeal*, 87 Penn. St. R., 133.

Where a life insurance policy was issued upon the life of the husband for the use of his wife, and if she died before him the amount of insurance was payable "to her children for their use, or to their guardian if under age," and the wife died before the husband: Held, that a grandchild of the insured, the issue of one of the children who died before his mother, is entitled to a share under the policy: *Hull v. New York, etc.*, 20 N. Y. Daily Reg., 593, 62 How. Pr., 100.

S. P., Robinson v. Duvall, 13 Chicago Leg. News, 417.

A statute authorizing a wife to procure an insurance upon the life of her husband for the benefit of his surviving wife and children, with liberty to the husband to pay not exceeding \$500 annual premium, should be liberally construed, but does not apply to a policy existing at the time of the passage of the act, though conforming to the

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terms of the statute: *Fearn v. Ward*, 65 Ala., 33.

To bring an insurance by a wife upon the life of her husband within the provision of the act of 1840 (chap. 80, Laws of 1840), it is not essential that it should appear either by the terms of the policy, or by extrinsic evidence, that it was the intention of the assured to avail himself of the provisions of that act, the intention is to be presumed from the beneficial nature of the policy.

The omission to provide in the policy for the disposition of the fund in case of the death of the wife before that of her husband, or a statement in the application that the insurance is for the benefit of the wife solely, does not rebut the presumption that in taking the policy the wife had in view said act.

As to whether extrinsic parol evidence showing that the parties did not intend to make the policy subject to the act of 1840, would be competent, *quære*. An endowment policy is within said act of 1840, as amended in 1866 (chap. 686, Laws of 1866). Accordingly held, that an endowment policy issued in 1868 to plaintiff upon the life of her husband, payable to her, her personal representatives or assigns, was, in the absence of evidence showing a contrary intent, to be presumed to have been procured under the act; and that it was non-assignable save in the cases where assignments are authorized by statute (chap. 821, Laws of 1873; chap. 248, Laws of 1879): *Brummer v. Cohn*, 86 N. Y., 11, affirming 9 Daly, 36, 58 How., 239, 57 id., 386, 6 Abb. N. C., 409; *Wilson v. Lawrence*, 76 N. Y., 585, affirming 13 Hun, 238; *De Joner v. Goldsmith*, 46 N. Y. Super. Ct. R., 131; *Mutual, etc., v. Jackson*, 62 How. Pr., 325; *Living v. Domett*, 26 Hun, 150, holding that under act of 1840 alone, such a policy was not exempt, is overruled by *Smillie v. Quinn*, 25 Hun, 332, affirmed 16 N. Y. Weekly Dig., 16.

See *Dannenbaum v. Lawrence*, 1 Brooklyn Daily Record, No. 30, p. 2. In *Robinson v. Mutual, etc.*, 19 Blatchford, 194, an assignment by a wife living in New York, of a policy issued by a New Jersey company and payment to the assignee by the company, was held valid after payment by the as-

signee to the wife of part of the proceeds of the policy.

But see *Mutual, etc., v. Jackson*, 62 How. Pr., 325. See also *Bloomington v. Lisberger*, 24 Hun, 356.

As to rights of widow and creditors where premiums exceeded sum allowed by statute: *Pullis v. Robison*, 73 Mo., 201.

A policy of insurance upon the life of the husband, for the benefit of the wife, may be assigned or pledged by her as collateral security for the debt of her husband, unless prohibited by statute: *Collins v. Dawley*, 4 Colo., 138; *Conn. Mutual v. Ryan*, 8 Mo. App., 535.

It seems, that where a person takes out a policy of insurance upon his own life, and the amount is made payable to another having no interest in the life, or where the insured assigns his policy to one having no such interest, the beneficiary or the assignee may hold and enforce the policy, if it was valid in its inception and was procured or the assignment made in good faith.

In 1846, L. procured a policy of insurance on his life, payable to plaintiff as trustee for H., the wife of L. H. died intestate in 1857. In 1861 L. married M., and in 1864 plaintiff, upon the request of L., for value received, assigned the policy to M. L. died intestate in 1878, leaving M. his widow and one child by her, and several children by his first wife surviving him. He paid the premiums upon the policy up to his death. In an action to determine conflicting claims to the moneys paid upon the policy, the court found that it was the intention of L., when he procured the policy and paid the premiums, that its avails should go to his widow if he left one, not to his children.

Held (Miller and Danforth, JJ., dissenting), that during the life of H. the policy was her property, and upon her death the title vested in L., her husband, as survivor, J. then becoming by operation of law his trustee, and the policy continuing valid in his hands; that the assignment vested the title in M., and that she alone was entitled to the moneys paid thereon.

Also held, that the common law right of survivorship, in the husband, in such case, was not affected by the statute in respect to insurance upon

the lives of husbands for the benefit of their wives (chap. 80, Laws of 1840, as amended by chap. 77, Laws of 1862, and by chap. 821, Laws of 1873).

It seems, that had the assignment been executed without consideration, it would have been valid and effectual: *Olmstead v. Keyes*, 85 N. Y., 593, distinguishing *Eadie v. Slimmon*, 26 id., 9, and *Barry v. E. L. A.*, etc., 59 id., 587.

In March, 1878, Mrs. Letens assigned to the plaintiff in trust for all the children of herself and husband, two policies of insurance issued upon the life of her husband payable to her in case she survived, and to his children in case she did not survive him. All the premiums upon the policies had been paid by the husband. Upon the husband's death, subsequently, in March, 1879, the amount due upon the policies was paid into court. In May, 1879, an execution was issued upon a judgment for a deficiency, entered against Mrs. Letens after the date of the assignment, in an action brought to foreclose a bond and mortgage given by her prior thereto, and thereafter a receiver of her property was duly appointed.

In an action to determine the rights of the parties to the insurance moneys:

Held, that Mrs. Letens' creditors could not claim that the assignment of the policies was void because of Mrs. Letens' inability to assign them; that the right to avoid the assignment, if such right existed, was personal to her; that the creditors had no such legal or equitable right to Mrs. Letens' interest in the policies as to render her assignment to the trustee fraudulent as to them: *Smillie v. Quinn*, 25 Hun, 332, affirmed 16 N. Y. Weekly Dig., 15.

Under the act of April 15, 1868, if a policy of insurance is issued in favor of the wife, children, or other dependent relative of the assured, the title in such beneficiary is good against the claims of creditors, although the assured was insolvent at the time the policy was issued.

An assignment of a policy of insurance, procured from a wife by undue influence and coercion on the part of the husband, is void. The assignee in such a case is not a purchaser for value, by reason of a claim he may have against the assured, which is secured by the assignment: *McCutcheon's Ap-*

peal, 13 Lanc. Bar, No. 38, p. 147, distinguishing *Elliott's Appeal*, 14 Wright, 75.

The defendant in 1866 issued a policy of insurance upon the life of plaintiff's intestate, payable to the wife of the insured. By the laws of Massachusetts, where the insured and his wife resided when the policy was issued, such policy enured to the wife's separate use and benefit, and to the benefit of her children, independent of her husband or his creditors. By the laws of that State, also, the property of a married woman is her own separate estate, and may be disposed of by her by will, or if she dies intestate it passes to her legal representatives, and is to be disposed of under the statute of distribution of that State. The wife died intestate before her husband, and left no children: Held, that by the laws of Massachusetts the insurance money belonged to the estate of her husband, and the action for its recovery was properly brought by his personal representatives: *Cole v. Knickerbocker Life*, 63 How. Pr., 442.

A policy of insurance was made on the life of a wife payable to a husband, his executors, etc.; the husband died first: Held, nevertheless, on the death of the wife, the proceeds of the policy on her life went to her husband's executors: *Estate of Hardy*, 12 Phila., 29.

A policy of insurance on a husband's life payable to his wife, or her representatives after the death of the wife and of the husband, would go to the wife's administrator, and the husband's administrator would be entitled to an equal share with the administrator: *Estate of Baltz*, 12 Phila., 29, following *Deginther's Appeal*, 34 Leg. Int., 86.

As to the proper form of an action to recover dues from a beneficial association by a member in good standing: *Smith v. Society*, 12 Phila., 380; *Poultney v. Bachman*, 62 How. Pr., 466.

The charter of an insurance company provides that "the fund created for the benefit of the widow and children of a deceased member shall be paid to them," without fixing the proportion each shall take. Held, that the statutory rule as to the disposition of surplus personality of an intestate shall obtain: *McLin v. Colvert*, 78 Ky., 472.

Under section 1182 of the Code, the proceeds of a policy of insurance upon

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the life of an individual becomes the separate property of the husband, or wife and children of such individual, or in case the insured leaves a wife and no children, of the wife, to the exclusion of the other heirs, and section 2372 should be construed in harmony with such provisions: *Rhode v. Bank*, 52 Iowa, 372, 13 West. Jur., 544.

Where a policy is payable to the assured's wife "*Sarah* and her children," if *Sarah* die leaving a child, and the assured marry again, leaving children by his second wife, *Sarah's* child is entitled to the entire proceeds of the policy: *Lockwood v. Bishop*, 51 How. Pr., 221.

When an accepted applicant for membership pays his membership fee, and promises, in his written application, to pay the further sum of one dollar and ten cents whenever any other member dies, or forfeit his own claim to a benefit; and the by-laws provide that the association, within thirty days after satisfactory proof of his death, will pay to his "widow" as many dollars, not exceeding one thousand, as there are surviving members at the time of the death,—a contract of life insurance is completed.

Also held, that the contract being in writing and unambiguous, and being in terms payable to the widow, the legal widow was entitled to the benefit; and that no evidence *dehors* the written contract was admissible to vary its construction, and show that another woman, with whom the deceased member went through the form of marriage and cohabited for many of the last years of his life, was intended: *Bolton v. Bolton*, 73 Maine, 299.

A member of an incorporated beneficial society does not stand in the relation of a creditor to the society, and can claim only such benefits as are prescribed by the by-laws existing at the time he applies for relief: *St. Patrick, etc., v. McVey*, 92 Penn. St. R., 510.

The action was brought against a lodge of odd fellows by one of its members, to recover "sick benefits," to which he claimed to be entitled. The plaintiff had joined the lodge years ago, when its by-laws provided that in case of sickness every member should receive a specified sum weekly "during his sickness or disability." Another section empowered the lodge to alter

or amend the by-laws whenever deemed expedient. After the plaintiff had been taken sick, and while he was in receipt of the weekly sum allowed him, a by-law was passed reducing the amount of the payments from four dollars to one a week.

Held, that the lodge was bound to continue paying the plaintiff the full amount to which he was entitled when he became sick.

Although the lodge had the right to change its by-laws, yet, whatever sum any member is entitled to when he is taken sick must be treated as a fixed amount, which cannot be subsequently reduced during the continuance of the sickness. The right to this is a vested right which cannot be annulled or varied while the disability lasts: *Poultney v. Bachman*, 62 How. Pr., 466.

Where a charter provision of an insurance company, giving the right to the assured to surrender his policy and receive therefor a certain consideration, is, in accordance with other provisions of the charter, abrogated, the assured having taken his policy with notice that this change might be made, cannot complain that his contract has been changed against his consent: *Allen v. Life Association*, 8 Mo. App. R., 52.

An article contained in the by-laws of a benevolent association, providing for the payment to the widow of a deceased member, who had been such for six months immediately preceding his death, the sum of four dollars monthly during widowhood, is binding upon the association, upon the application of the widow of such deceased member, notwithstanding that subsequently to the death of the member the association revised said article by substitution of another, requiring each member to pay to a widow on the death of her husband, who had been a member for six months immediately prior to his death, the sum of one dollar: *Gundlach v. Germania, etc.*, 49 How. Pr., 190.

By the constitution of a mutual aid society, it is provided that the benefit be paid to the legal representatives of a member at his death. At the time of becoming a member he designated his wife *Margaret* as the beneficiary. Held, the husband surviving *Margaret*, that his representatives took the fund instead of hers: *Expressman's, etc., v. Farrar*, 9 Mo. App. R., 412.

Henry R. Jacques procured a policy of insurance upon his life for \$2,000, payable upon his death to his sister Elizabeth. She died during his lifetime. Thereafter he surrendered the policy and took out another one for the same amount, payable upon his death to his nephew David. He always retained the policies in his own possession, paid the premiums falling due upon the first one, and allowed the dividends declared upon the second to be applied to the payment of the premiums accruing upon it. His sister had lived with him, taking care of his household and family for many years prior to her death, and was entirely dependent upon him for her support and maintenance.

Held, that the rights of the insured over the policy depended upon what his intentions were when he obtained the insurance, as such intentions could be gathered from the attending circumstances.

That in this case he had power to surrender the policy upon the death of his sister without the consent of her representatives, and that the nephew and not the representatives of the sister was entitled to receive the amount payable under the second policy: *Bickerton v. Jacques*, 28 Hun, 119; 12 Abb. N. C., 25.

If a policy be payable to the wife of the assured at his death, she being then living, but if not, to her children, and a proviso be inserted "that in case of the decease of the wife during the lifetime of the assured, the said assured may, at his option, substitute any other beneficiary under this policy,"—such substitution must be made upon the decease of the wife, or within a reasonable time thereafter. After the date fixed for the next ensuing payment of premium it cannot be made.

The power thus conferred on the assured of substitution, is not executed by a bequest in his last will made a year after the death of the wife, in which the attempt is made to give and bequeath the policy in question with three others, none of which were a part of his personal estate: *Eiseman v. Judah*, 1 Flippin, 627.

H. and his wife each purchased a policy of life insurance in favor of the other, and payable to his or her respective executors, administrators or assigns. H. died first, whereby the policy on his

life became payable to the wife. She afterwards died, and the money secured by the policy on her life was paid to the executors of her deceased husband. H. by his will devised and bequeathed to his wife "all my estate both real and personal, of whatsoever kind and wheresoever the same may be at the time of my decease, for and during the time of her natural life, with full power and authority to appropriate to her own use such of the personal property as to her shall seem meet." He further provided, "after the death of my said wife, I give, devise and bequeath all the rest, residue or remainder of my estate, both real and personal, to my son John, his heirs and assigns forever;" and in the case of the death of John before the death of his wife, without leaving issue, then to testator's daughter Esther. John died before the wife. On a distribution of the funds in the hands of the executors of H., the executors of the wife claimed the amount of the policy secured on her life for the benefit of the legatees of the wife, alleging that they were entitled thereto under the provisions of H.'s will. The court below held that the wife had only a life estate, and no power of appointment to dispose of the proceeds of the policy of insurance, and rejected the claim. Held, that this was not error: *McCauley's Appeal*, 93 Penn. St. R., 102.

A policy of life insurance assured the life of a husband "for the sole use and benefit of M. B., his wife, in the sum of \$1,000, for the term of ten years from date," and continued: "and the said company doth hereby promise and agree to pay the said sum assured, at its office, to said person whose life is assured, or assigns, in ten years from the date hereof, viz., in the year when the said person shall have attained the age of 55 years; or in case of the previous death of the person whose life is assured, to the said beneficiary or assigns in sixty days after due notice and proof of such death * * the case of the death of the said beneficiary before the death of the person whose life is assured, the amount of the insurance shall be payable at maturity to the heirs or assigns of the person whose life is assured." The husband did not die within the ten years. Held, that the wife cannot recover the one thousand dollars; that the policy

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enured to her only in case the husband died within the term, leaving her surviving: *Tennes v. North Western, etc.*, 26 Minn., 271.

By the terms of a policy of life insurance, the insurer promised to pay a certain sum to the assured on a day named, or to his children within sixty days after due notice and proof of loss. Held, that the promise to pay to the children took effect only in case the assured should die before the day named; that before that time, the assured had a valuable interest in the policy, which passed to his assignee in bankruptcy; and that the assignee could maintain a bill in equity to recover possession of the policy from the insurance company to whom it had been surrendered and discharged by the assured after his bankruptcy, and by whom it was secreted and withheld so that it could not be replevied: *Brigham v. Home, etc.*, 131 Mass., 319.

The A. O. U. W. is a mutual benefit association, incorporated under the laws of this State. By its constitution and by-laws the members are entitled to participate in a beneficiary fund, upon compliance with the terms and requirements of the constitution of the order, "with the right to hold, dispose of, and fully control said benefit at all times." R. became a member, and a certificate of membership was issued to him, reciting that he "is entitled to all the rights and privileges of membership in the Ancient Order of United Workmen, and to participate in the beneficiary fund of the order to the amount of \$2,000, which shall be paid to his wife Eva K. Richmond." Held, that because of the right in the member "to hold, dispose of, and fully control said benefit at all times," his appointment of his wife to receive the benefit was revocable, and until it was revoked she had only an expectancy, dependent on his will and pleasure, which terminated when she died before he did, and did not pass to her representatives: *Richmond v. Johnson*, 28 Minn., 447.

The rules of a regularly incorporated mutual benefit association provided that, on the death of a member, his share of the beneficiary fund should be paid to the persons named by him on the will-book, and that if he named no one, it should be divided equally among his family. The rules did not assume

to take away the right to change the disposition of the fund. Held, where a member made a will after entering an order on the will-book, that the will should be followed: *Supreme Council, etc., v. Priest*, 46 Mich., 429.

By the charter of the Knights of Honor, the benefit fund of a member shall be paid "as he may direct," and by the constitution he may direct the payment by will, entry in the record book, or by a benefit certificate. Held, that the direction by benefit certificate might be changed, unless there has been a valid executed transfer of the certificate: *Tennessee Lodge v. Ladd*, 5 Lea (Tenn.), 716.

S. executed in favor of his wife the following instrument of writing: "Pittsburgh, 11th Dec., 1875, I, Conrad Schad, husband of Margaretta Schad, have insured my life with the Knickerbocker Co. in New York, for four thousand dollars (\$4,000), I, Conrad Schad, assign the whole amount, four thousand dollars, to my wife Margaretta Schad, after my death, when she can do with it according to her best will, without partiality towards her children. This I have written with good sound mind, and set my name to it, Conrad Schad;" which instrument was with other evidence offered to prove an assignment of the policy mentioned to the wife, who, as administratrix, was sought to be charged with the amount of the policy. Held, that under the act of April 15, 1868, Pamph. L., 108, the burden of proof was on the wife to show clearly a *bona fide* assignment; that the instrument was testamentary in its character; that the wife, as administratrix, was bound to account for and was properly surcharged with the amount of the insurance: *Schad's Appeal*, 88 Penn. St. R., 111.

A testator gave to his wife \$5,000, "to be paid to her, as far as can be, out of the insurance money coming to my estate from the insurance on my life." He had three policies on his life, amounting in the aggregate to \$2,500, payable to his wife, on which he always paid the premiums; he kept the policies in his possession, and delivered them, with his other papers, etc., to his executor, and he had no other policy on his life. Held, that the amount received from the insurance

policies by the widow, after his death, must be credited on the \$5,000 legacy, notwithstanding the fact that such policies were in terms payable to her: *Fort v. Edwards*, 33 N. J. Eq., 641.

The defendant was incorporated as a charitable and benevolent association, its objects being to promote the cause of temperance, discourage drunkenness, and guard against the consequences thereof, and provide for the widows and orphans of any member of the said society who might thereafter die. At the time the plaintiff joined the society an article of the constitution provided for the payment of a certain weekly sum to sick members. Thereafter that article was, in pursuance of a resolution offered and adopted, as provided by the constitution for the amendment of the constitution and by-laws, suspended. The meetings of the society were, as provided in the by-laws, held on Sunday evening.

The plaintiff having fallen sick, after the article providing for a weekly payment to sick members had been suspended, brought this action to recover the amount which he claimed should have been paid to him thereunder. Held, that the society had power under its charter to provide for weekly payments to sick members. That the right of the plaintiff to receive such payments was liable to be taken away by an alteration or suspension of the article providing for them. That the resolution of suspension was not rendered invalid by the fact that it was adopted at a meeting held on Sunday. That no notice of its proposed adoption need be given to him: *McCabe v. Father Matthew*, etc., 24 Hun, 149.

The amount received by a wife upon a policy of insurance, issued upon the life of her husband for the benefit of herself and children, is not subject to the claims of her creditors: *Leonard v. Clinton*, 26 Hun, 288.

Contra in Massachusetts: *Norris v. Massachusetts*, etc., 131 Mass., 294.

The proceeds of a policy of life insurance which is payable to another than the insured do not constitute assets of his estate, and cannot be disposed of by him by will: *McClure v. Johnson*, 56 Iowa, 620.

See when payable to legal representatives: *Kelly v. Mann*, 56 Iowa, 625, 10 N. W. Repr., 211.

A beneficiary fund payable on the death of a member of an association to persons named by him is not to be treated as a part of his estate, subject to his debts, and does not go to the administrator, but should be paid directly to the beneficiaries or to their guardian: *Supreme Council*, etc., *v. Priest*, 46 Mich., 429; *Ballou v. Gile*, 50 Wisc., 614.

Where the contract between a benevolent aid association and its individual members is for the payment upon the death of a member of a sum of money to his devisees, and such member dies intestate, the administrator is not entitled to recover such amount from the association: *Worley v. North Western*, etc., 14 Cent. L. J., 154, U. S. Cir., Iowa Dist.

Plaintiff's testator was a member of the Conductors' Life Insurance Company, the by-laws of which provided that, upon the death of any member, each of the survivors should pay the sum of one dollar, and that the premium so to be paid in the case of the death of any member, "may be disposed of by his last will and testament, otherwise it shall belong to and be paid to his widow; or in case he shall leave no widow, then to the heirs and legal representatives of the deceased; and in the absence of such will, and in case such member leave no widow, heirs or legal representatives, such premium shall revert to the company." Held, that the power reserved to the testator to dispose of the amount payable at his death was in the nature of an appointment, and must be exercised as such.

That the said amount would not pass as a part of his estate under the residuary clause of his will, but only in pursuance of a clause expressing in clear and unmistakable terms the intention of the testator to divert it from the purposes to which by the by-laws of the company it was to be devoted: *Greeno v. Greeno*, 23 Hun, 478.

S. P., *Wead v. Gray*, 8 Mo. App. R., 515, 521.

Where policies taken out by a husband upon his own life, payable to his representatives, are assigned by him to his wife, who thereafter, with intent to defraud her creditors, assigns the policies to her children, the creditors of the wife are entitled to recover from

the children the surrender value of the policies at the time of the assignment to them : *Leonard v. Clinton*, 26 Hun, 289.

See *Genesee River, etc., v. Mead*, 16 N. Y. Weekly Dig., 486.

A brother of E. insured his life for her benefit, upon his death the insurance money was paid to her father, who credited it to her private account. The brother was at the time of his death indebted to the father, and upon a subsequent statement by E. that she intended the money to go to pay such indebtedness, the father caused the credit of said money to be transferred from the account of E. to that of the brother. After the transfer E. was furnished with her account, her attention was called to the transfer which she said was correct. She settled the account, paying a small balance due thereon and receiving a receipt. In an action by the executor of E. to recover of her father's estate the amount of the insurance money, held that the effect of the transaction between E. and her father was to divest her of any claim against him for or on account of said money; that it was an effectual appropriation by her of her money in payment of so much of her brother's indebtedness; that as it was not a gift or intended as such, the law as to gifts *inter vivos* had no application : *Hodge v. Hoppock*, 75 N. Y., 491.

The association known as the "Merchants' Exchange Mutual Benevolent Society of St. Louis" was held to be an insurance company, and within the laws of Missouri concerning life insurance, and held also not to be exempt by the legislature of that State from the obligation to comply with the general insurance laws : *State v. Merchants, etc.*, 72 Mo., 146, 9 Amer. L. Rec., 338.

A contract by a benefit society to pay money upon the death of one of its members to one who it is clearly apparent has no interest in the life insured, is contrary to public policy and will not be enforced : *Mutual, etc., v. Hoyt* 9 N. W. Repr., 497, 46 Mich., 473.

A wife has no title to the proceeds of an insurance policy upon her husband's life, unless it be so expressed in the policy, though the policy recites that the premiums were paid by her, when in fact they were all paid by

her husband or his creditors : *Conn. Mut., etc., v. Ryan*, 8 Mo. App. R., 535.

Payment of the premiums by a stranger to the policy without any contract with the person entitled to the benefit of the policy, gives no title to it or lien on the insurance moneys. In the eye of the law, the person making such payment is a mere volunteer : *Lockwood v. Bishop*, 51 How Pr., 221.

Where a policy of insurance has lapsed by reason of non-payment of premiums, an agreement whereby the annual premiums are paid by a creditor of the insured, with the consent of the company, upon the condition that the premiums so paid and the amount due such creditor shall be first paid, and the balance to go to the wife and children of the insured, is not in fraud of the rights of creditors : *Bonnell v. Graham*, 16 N. Y. Weekly Dig., 216.

Defendant became a member of a mutual company, whose by-laws provided that assessments should be paid in thirty days after notice, and that in case such payment was not made, the membership should cease without notice. Held, that the issuance of a certificate was a good consideration for defendant's agreement to pay assessments; that a neglect for thirty days to pay assessment was equivalent to a resignation or withdrawal, and that defendant was liable for losses which occurred prior to the expiration of the thirty days, but not for losses happening thereafter : *McDonald v. Lewin*, 16 N. Y. Weekly Dig., 449.

Where C. took out a policy of insurance on his life for the benefit of his wife, and the insurance company failed during the lifetime of C.: Held, C. might sue in his own name to recover the premiums he had paid : *Universal, etc., v. Cogbill*, 80 Gratt. (Va.), 72.

To same effect also, *Simar v. Canady*, 53 N. Y., 298.

Contra : *Trabandt v. Connecticut*, etc., 131 Mass., 167.

In a suit on the policy by the beneficiary against the insurance company, declarations and admissions of the insured as to the state of his health at the time the insurance was effected, but made four or five months thereafter, are not admissible in evidence to falsify representations made by him in his application for the insurance : *Valley Mutual Life v. Burke*, 7 Virg. L. J., 173.

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A certificate of membership in a mutual life insurance company provided that, on the death of the wife of the plaintiff, an assessment should be made upon the policy holders in the company for as many dollars as there were policy holders, and that the sum collected, not exceeding one thousand dollars, should be paid to him within ninety days from the filing of the proof of death: Held, that a declaration containing no allegation of a neglect to make the assessment provided for, and assigning no breach except of a promise to pay one thousand dollars, was fatally defective, and that the defect was not cured by the verdict: *Curtis v. Mutual Benefit Life Co.*, 48 Conn., 98.

The by-laws of an incorporated benevolent society provided that a sick member, upon sending to the society "every week during his sickness" a certificate signed by a qualified surgeon stating his illness, "shall be entitled

to a weekly allowance of five dollars." A member of the society was taken ill in another State, and sent to the society a certificate stating his illness, and signed by a person who was in fact a surgeon in attendance upon him, but who did not describe himself in the certificate as such. Accompanying the certificate was a letter from the member, in which he spoke of it as the doctor's certificate.

No other certificate was furnished until after his return to this State about three months later, when he furnished a certificate that he had been ill since the date named in his first certificate. Held, that the first certificate was a substantial compliance with the by-law, and entitled the member to receive an allowance for one week; and that he was not entitled to any further allowance: *Dolan v. Court Good Samaritan*, 128 Mass., 487.

[4 Appeal Cases, 247.]

J.C. (*), February 7, 8, 1879.

[PRIVY COUNCIL.]

*CHARLES HAMON, *Plaintiff*; and JOSUÉ JOSUÉ [247
GEORGE FALLE, *Defendant*.

ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

Action for Damages—Representation by Defendants to Plaintiff's Employer in good faith in the course of their Business.

Declaration, that the plaintiff, a certificated master mariner, having been employed as master of certain vessels, his services were retained by the proprietor of ship U.; that he was getting ready to take command thereof when he found that the defendant insurance society had intimated to the said proprietor that if the plaintiff were to take command of her the society would refuse to continue to insure her; that he then took certain steps in order to induce the society to reconsider their resolution or to give him an opportunity of refuting the reasons they might have for it, but in vain; that by reason of this proceeding on the part of the society he had lost his employment, and that this arbitrary and vexatious conduct on the part of the society caused him considerable damage in depriving him of his employment, and consequently of the means of providing for and maintaining his family—praying that the conduct of the society might be declared illegal, arbitrary, and vexatious, and that they might pay damages £500.

Plea in effect that the defendants acted upon information which they believed to be true that the plaintiff was addicted to intemperance, that they communicated their refusal to insure, but not their information, to the defendants, that they did so in good faith, and without any malice towards the plaintiff, without any desire to

(*) *Present*:—SIR JAMES W. COLVILLE, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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injure him, and in the honest belief that the information they had received was sufficient to justify the course which they took:

Held, that such defence (if proved) was a sufficient answer to the *prima facie* cause of action disclosed by the declaration. The representation made by the defendants was clearly one made in the conduct of their own affairs and in matters in which their own interest was concerned:

Held, further, that such defence was established by proof that the defendants had received such information, and had reason to believe it to be true, without conclusively establishing habits of intemperance against the plaintiff as upon a plea of justification.

APPEAL from a judgment of the Royal Court of the Island of Jersey (July 23, 1877).

248] *The facts of the case and the pleadings sufficiently appear in the judgment of their Lordships.

Mr. Pollard, and Mr. Channell, for the appellants.

Mr. Benjamin, Q.C., Mr. Bompas, Q.C., and Mr. Pelham, for the respondent.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILLE: The plaintiff in this case is a master mariner holding a certificate from the Board of Trade. The defendant was, when the action was brought, the president of the Jersey Mutual Insurance Society for Shipping, and is sued as the representative of that society. The society is, as its name imports, a mutual insurance society for shipping, and is governed by the rules which were put in as part of the evidence before the court below, and are now before their Lordships. Some of those rules will have to be more particularly considered hereafter, but it is sufficient at present to state that the general course of business of the society seems to be that the different shipowners who become members of it underwrite each other's vessels in a certain proportion, and that the insurances effected are in the nature of time policies for one year.

The action is a peculiar one. The effect of the pleading in the nature of a declaration is as follows:—that the plaintiff holding the position which has been already mentioned, and having been employed as master of certain specified vessels, and in particular of the *Dora*, which then belonged to the late M. Felix Briard, his services were retained by M. James Sebire, the proprietor of the ship *Ulysses*; that he was getting ready to take the command of that vessel when he found that the insurance society had intimated to M. Sebire that if the plaintiff were to take command of her, the society would refuse to continue to insure her; that he then took certain steps in order to induce the society to reconsider their resolution, or to give him an opportunity of refuting the reasons they might have for it, but in vain; that

by reason of this proceeding on the part of the society the had lost his employment, *and that this arbitrary [249 and vexatious conduct on the part of the society caused him considerable damage in depriving him of his employment, and consequently of the means of providing for and maintaining his family. And he prayed that the conduct of the society might be declared illegal, arbitrary, and vexatious, and that they might pay the damages claimed to the amount of £500.

In the first instance, the society took the proceeding which is set out in the record, which is partly in the nature of a demurrer; but also sets forth the resolutions of the committee under which the telegrams which had passed between them and M. Sebire were sent, and which were in fact the cause of the plaintiff's non-engagement as master of the vessel. The effect of this pleading was to submit that there was no ground of action. The court, however, considering that the course adopted by the society had caused considerable damage to M. Hamon in preventing him from following his profession as a master mariner; that the resolutions of the committee produced by the defendant contained no *motif* or reason to justify the proceeding which the committee had thought fit to adopt; and that such a proceeding, if adopted—"sans cause ou raison valable"—without cause or valid reason, would be an arbitrary and vexatious act, that would give a right of action to the person who was subject to it; decided that the society ought to suffer the consequences of its act, unless it furnished sufficient grounds or motives to justify its conduct. Leave was given to appeal to the full court, the court of greater number, but the defendants have never availed themselves of that permission. Mr. Benjamin has, in argument, fairly admitted that the declaration must be taken to disclose a *prima facie* cause of action; and that the only question is whether the plea or *prétention* which the defendants filed under the last-mentioned order has been proved, and if proved constitutes a valid defence.

That *prétention* is to be found in the record. In substance it pleads that the committee of administration only took the course they did in consequence of the information which they had received from sources respectable in themselves and worthy of belief, and which in the opinion of the committee established that M. Hamon when in command of the ship *Dora*, belonging to *Messrs. Felix Briard & Co., had [250 been guilty of and had given way to intemperance, and had conducted himself in such a way as not to deserve the con-

fidence of his owners, who had dismissed him from their service; that in those circumstances, the committee not being able to have confidence in M. Hamon, and thinking that an insurance was a purely voluntary act on their part, had decided not to expose the society to the risk of becoming responsible for the fate of a ship which would be placed under the command of a man whom they had reason to believe was addicted to a vice criminal in any case, but still more so in the case of a man holding the position of master of a vessel; that having taken that determination, the committee confined themselves to communicating to M. Sebire, without letting him know in terms the information which they had received on the subject of M. Hamon, whom, so long as they could protect the interests of the society, they had no desire to injure. It further states that in support of their *prétention* the defendants produced the letter from M. Briard, which is to be found in the evidence, and which they say was brought by M. Hamon to the office of the society only a few days before the date of the correspondence between M. Sebire and the committee, and they contend that that letter alone justifies fully the conduct of the society against Hamon, and that it was of a kind and of a nature to inspire doubt with reference to him and distrust of him, and that they cannot be bound to furnish legal proof of the conduct of Hamon whilst he had the command of the vessel Dora, but that it sufficed that they should have reasonable grounds for refusing to place their interest at the risk of the conduct or acts of Hamon.

The effect of the defence thus pleaded is clearly that the defendants acted in good faith and without any malice towards the plaintiff, without any desire to injure him, and in the honest belief that the information they had received was sufficient to justify the course which they took. Their Lordships are of opinion that such a defence, if proved, is a sufficient answer to the *prima facie* cause of action disclosed by the declaration. The finding of the court that the act of the defendants would be arbitrary and vexatious, and that the defendants would be liable for damages unless they could show sufficient motives to justify what they did, points to 251] *that conclusion. Their Lordships further think that if the case is to be likened (as in the argument it has been) to an action for defamation it would fall within the rule thus laid down by Mr. Baron Parke in the case of *Too-good v. Spyring* ⁽¹⁾: "In general an action lies for the malicious publication of statements which are false in fact, and

(1) 1 C. M. & R., 193.

injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned." In the present case their Lordships think that the representation made by the society to Sebire was clearly one made in the conduct of its own affairs, and in matters in which their own interest was concerned.

It was argued, however, that the defendants were not entitled to the benefit of this rule by reason of their non-observance of the rules by which the society is governed. The objection founded on the non-observance of the rules may be taken to be either that those rules created a positive duty on the part of the defendants towards the plaintiff, of which the non-observance of the rules was a breach, which in itself constituted a cause of action; or that the non-observance of the rules, and therefore the irregularity of the proceedings adopted by the society, were evidence of actual malice sufficient to deprive the defendants of any defence which they might have on the ground of privilege.

It will be convenient now to deal with the question which has been thus raised upon the rules in either form. In their Lordships' opinion it is impossible to treat these rules as constituting anything in the nature of a contract between the society and the plaintiff, or as imposing upon them in the actual circumstances of the case any positive duty towards him. If, therefore, what the defendants did was not otherwise actionable, a departure from the rules, even if the case were within them, unless shown to be malicious, would not make it actionable.

They do not, however, think that in this case the non-observance of the rules has been established. Those that are chiefly relied upon are the 53d and the 37th in the earlier edition of the *rules. The 53d is: "That the owners [252 of vessels insured in this society are hereby required, when they appoint masters to the command of their vessels, to give notice thereof in writing to the secretary within forty-eight hours, under a penalty of 1s. per cent. on the amount insured on said vessel." It is said that Sebire's notice that he was about to put the plaintiff in command of his vessel was given under this rule, and that that necessarily implied that the appointment had been actually made, a fact which would bring the master within the operation of the other rule. Their Lordships are not prepared to put that con-

struction upon the 53d rule. They think that it may very well be taken to mean that when the owners, as in this case, are about to appoint a new master to the command of their vessel, they are to give notice of it to the secretary with a view to any objection being made by the society which it might be competent for them to make; and that even if the rule be taken to apply only to an actual appointment, the evidence fails to show that in this case there had been an actual and complete appointment of the plaintiff as master of the *Ulysses*, which on that construction of the rule would bring him within it. Again, whatever may be the construction to be put upon the 53d rule, their Lordships do not think that in this case the master can in any way be brought within the operation of the 37th rule so as to make it imperative upon the society to proceed under its provisions. That rule says: "That masters who by habitual intemperance may endanger the lives or property under their charge, shall also be considered unfit to command any vessel insured in this society; and whenever such cases are reported, and after due inquiry found correct, they will be submitted to a full committee who will have power to dismiss or suspend any master so addicted for no less a period than six months after his arrival in a port of discharge in the United Kingdom; and no master dismissed shall continue to sail in any vessel in this society during the period of such suspension in any capacity whatever." No doubt if a master has been actually appointed to a vessel, and the society seeks to subject him to the consequences, either of absolute dismissal or of suspension for a period of not less than six months, so as to make it impossible for him to continue to sail in any vessel insured by the society during the period of suspension [253] *in any capacity whatever,—if they proceed against him with the view of affecting him with these penal consequences, the rule may be applicable. But in this case they did not act or profess to act under this rule, and supposing that what they have done in this case be justifiable but for the rule, the non-observance of the rule does not appear to their Lordships in any degree to make it the less justifiable; or to afford any proof, or indeed evidence of actual malice in the transaction.

Their Lordships having stated their view of the issue which went down to the principal court to be tried between the parties, have now to consider whether that court was justified in finding that the plea or *prétention* was substantially proved. In their Lordships' opinion it is in substance proved by the evidence of M. Briard alone. It appears clear

by the evidence of that witness, who must be assumed to have been called by the plaintiff, since his examination in chief is by the plaintiff, that there had been some reports of intemperance which led to the inquiry to which M. Briard deposes as having taken place on the arrival of the vessel at Liverpool. M. Briard states that he examined all the crew on that occasion, and that all except one supported the charges of drunkenness, both in Java and on the voyage between Java and the Cape of Good Hope or St. Helena. There seems to have been no suggestion of intemperance after St. Helena. M. Briard's evidence seems also to support the allegation that in consequence of that inquiry M. Hamon did cease to be master of the vessel; and it appears further by a letter of M. Briard, the contents of which seem upon the evidence to have been known to the plaintiff, that he remained out of employment from that time up to the date of the letter. These circumstances were given in evidence to show that M. Briard had grounds for the statements he made to the society, though the more material question is, whether the company *bona fide* believed on reasonable grounds the truth of those statements. M. Briard's letter seems to have been written under these circumstances: when M. Sebire's letter of the 22d of September came to the society, stating, as they say, that he was about to appoint the plaintiff to the command of the *Ulysses*, they telegraphed to M. Sebire the first resolution of the committee objecting to the appointment; but it *appears [254 that before that there had been a verbal communication between the secretary of the society and M. Briard. That was on Friday, the 25th. On the following Monday the plaintiff applied to M. Briard evidently with the intention to get him to say what he could for him, and M. Briard then wrote: "Captain Hamon has just applied to me for a reference in writing respecting his conduct whilst in charge of the *Dora*. I can only repeat what I stated to Mr. Neel, the secretary, last Friday, that he had indulged in intoxicating liquors whilst at Java and on the homeward passage, but that after passing the Cape he had all liquor thrown overboard. He has never met with any accident to a vessel under his command that I am aware of, and I think the time he has been out of employment will have been a lesson to him for the future." M. Briard seems to have written with the intention of doing the best he could for the plaintiff in order to get the committee to reconsider their resolution of the 25th of September. It is not very clearly proved when that letter came before the committee, or whether it was before them

when they came to the resolution of the same date, Monday, the 28th, refusing to alter the former resolution; but that circumstance is not, in their Lordships' view, very material to the issue whether the defendants have established the broad ground that they did act *bona fide* and upon information previously received which they had reason to believe to be true. Certainly the letter, if it had been before them, would not have qualified that belief, because it contains an admission of the supposed intoxication on the voyage home; whilst it puts to the committee that M. Hamon having been so long out of employment, might reasonably be supposed to have resolved to conduct himself better for the future.

Their Lordships being of opinion that the evidence of M. Briard alone is sufficient to establish the substantial part of the plea, and to support the finding of the court, are glad to feel themselves relieved from the necessity of expressing any opinion whether the charge of intoxication, upon which there is conflicting evidence has been actually and in point of fact brought home to the plaintiff; nor do they understand that the Court of Jersey has found more than that the defendants had established that they had sufficient motives 255] and reasons to justify their conduct, such *motives and reasons being the information they had received, and a *bona fide* belief in the truth of it. Such a finding is obviously far less prejudicial to M. Hamon's character than one that the habits of intemperance imputed to him had been completely and conclusively established against him as upon a plea of justification. On the other hand, this consideration is sufficient to dispose of the applications which have been made to their Lordships to grant further inquiry. The question to be tried was, whether the defendants were justified in what they did, and that question has on sufficient evidence been determined in their favor. Their Lordships would not be justified in reopening the case upon any of the grounds which have been taken by the plaintiff, in order to try at the expense of the defendants a question which is not strictly relevant to the real issue between the parties.

Their Lordships must advise Her Majesty to dismiss the appeal, and to affirm the judgment of the Jersey court. The plaintiff having been admitted to appeal *in formâ pauperis*, there will of course be no order as to costs.

Solicitor for the appellant: *John Rae.*

Solicitors for the respondent: *Saunders, Hawksford & Bennett.*

[4 Appeal Cases, 256.]

[J.C.(*), Feb. 1, 4, 5; March 11, 1879.

[PRIVY COUNCIL.]

***THE BOROUGH OF BATHURST, *Defendants*; and [256
WILLIAM MACPHERSON, *Plaintiff*.**

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Nuisance in the Highway—Special Damage—Whether Municipality liable for Non-repair of Roads and Drains—New South Wales Acts, No. 13 of 1858 and No. 12 of 1867.

The municipality of B., incorporated under New South Wales Acts, No. 13 of 1858 and No. 12 of 1867, and having thereunder the care, construction, and management of the roads and streets within their municipality, constructed therein a barrel drain into which ran an open drain, the brickwork of which having broken away, and not having been repaired, a hole was caused, into which the plaintiff's horse fell, carrying the plaintiff with him, crushing the plaintiff's leg against one side of the hole, and causing a compound fracture of the leg.

In an action claiming damages against the municipality (a) for negligence in constructing the street, (b) for negligence in keeping and maintaining the street, and not repairing the drain, gutter, or sewer in the said street (plea, the general issue) the Chief Justice directed the jury that the defendants under their act of incorporation were not liable for the result of any mere nonfeasance; that if they thought fit to construct a sewer, and did the work in so negligent a manner as to bring about the accident, they were liable for that misfeasance; but if they constructed the sewer properly in the first instance and it became defective afterwards they were not bound to repair it; and further, that if the defective state in which the drain was arose from the operation of the weather or wear and tear, it having been properly constructed originally, they were not liable. Verdict for defendants:

Held, on motion for a new trial, that as regards (b) there was misdirection. The barrel drain was not only made by the defendants, but the sole control and management of it were by the statute vested in them. By reason of their construction of that drain and their neglect to repair it, whereby, as an indirect but natural consequence the dangerous hole was formed, which was left open and unfenced, they caused a nuisance in the highway for which, whatever their statutory obligation to repair may have been, they were liable to an indictment, and also to an action by the plaintiff who had sustained direct and particular damage from their breach of duty.

APPEAL from an order of the Supreme Court (June 29, 1877) making absolute with costs a rule for a new trial

*The respondent sued the appellants, as appeared [257 by the declaration filed on the 19th of December, 1876, on two grounds, the first count of his declaration in effect alleging that in consequence of the negligence of the appellants in and about the care, construction, and management of certain streets (to wit), Durham and Hope Streets, in the borough of Bathurst, of which streets the appellants had had the care, construction, and management, and also

(*) *Present*:—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

in the making of a certain drain in and along the said streets, and in allowing and suffering the same to be in a condition dangerous to persons lawfully passing over or along the said streets, whereby the respondent whilst lawfully passing over and along the said streets received injuries; and the second count of the said declaration alleging in effect that in consequence of the appellants negligently managing and continuing the said drain along the said streets, and neglecting to repair the said drain, the same became and was dangerous to persons lawfully passing over and along the said streets, whereby the respondent whilst lawfully passing as aforesaid received injuries. To this declaration the appellants pleaded not guilty, and issue was joined.

The facts and the direction of the Chief Justice to the jury at the trial appear in the judgment of their Lordships.

The jury found a verdict for the appellants.

On the 4th of June, 1877, a rule *nisi* was granted calling upon the appellants to show cause "why the verdict should not be set aside, and a new trial granted, on the ground that the ruling and direction of his honor the Chief Justice, that the plaintiff could not recover on the ground that the appellants were not bound to repair or keep in repair, was erroneous."

The rule *nisi* was made absolute with costs by order of the Supreme Court (Hargrave and Sir W. Manning, JJ., Martin, C.J., dissenting).

The Chief Justice was of opinion that at common law no liability was cast upon municipalities to keep in repair public roads and drains within the boundaries; that the law of New South Wales governing the question was the 117th section of the Municipalities Act, the words of which are "that the council shall within the boundaries of the municipality have the care, construction, and management of 258] public roads;" and that those words created no obligation upon the municipality to keep such roads in repair, but merely appoint the council the persons to exercise any care over the roads that may be exercised. The other two learned judges were of a contrary opinion, holding that the words of the 117th section, and of the other sections of the act, did cast a duty upon the council to keep the roads within the boundaries of the municipality in such a condition of repair as to prevent danger to the lives and limbs of passersby.

Mr. Benjamin, Q.C., and Mr. Boddam, for the appellants: The borough may have been liable to an indictment in this case, but that is the only remedy, unless another has been specially created by the acts of 1858 and 1867. At com-

mon law there is no liability for nonfeasance, only for misfeasance. The principle upon which that distinction rests is that, while at common law everybody is liable to an indictment for a nuisance, he is not liable for nonfeasance unless a statutory duty to do a thing is shown, and then the nonfeasance becomes a statutory misdemeanor, and does not involve liability at common law. Here the act of 1867 gave the municipality power to levy rates, but it did not impose a duty to repair the streets, or roads, or drains.

Reference was made to *Russell v. The Men of Devon* (*), where it was held that no action would lie against the inhabitants of a county or parish for breach of a public duty, because they were not a corporation; to *Harris and Wife v. Baker* (*), where it was held that there was no liability on the part of trustees of a public road because of remoteness, a power moreover, having been conferred upon them by act of Parliament, and not a duty imposed; to *Mackinnon v. Penson* (*), where it was held that inasmuch as the highway ought to be repaired by the public, an injury arising from that neglect cannot be the subject of an action, but is only ground for the Crown interfering. In that case also it was held that an action does not lie against a county surveyor for non-repair under a statute which enables a county to sue and be sued in the name of the surveyor. See also *Metcalf v. *Hetherington* (*). An action for nonfeasance does [259 not lie at common law against surveyors of highways; it must be given by statute: *Young v. Davies* (*). Nor against a metropolitan vestry: *Parsons v. Vestry of St. Matthew, Bethnal Green* (*); *Wilson v. Mayor and Corporation of Halifax* (*). Nor against a local board of health: *Gibson v. Mayor of Preston* (*). See also *Foreman v. Mayor of Canterbury* (*).

There was further no liability on the part of the appellants. The Municipalities Act did not impose on them any duty to repair, and keep in repair all the streets in the borough. Such a duty, in order to give a right of action for the breach thereof, must be created by common law, or by statute, or by charter, which is a contract with the Crown: *Mayor and Burgesses of Lyme Regis v. Henley* (10); *Hart-*

(*) 2 T. R., 667.

(*) 4 M. & S., 27.

(*) 8 Ex., 319; on appeal, 9 Ex., 609; S. C., 22 L. J. Mag. Dec., 57; 23 L. J. Mag. Dec., 97.

(*) 11 Ex., 257; 24 L. J. (Ex.), 314.

(*) 7 H. & N., 760; and in error, 2 H. & C., 197.

(*) Law Rep., 3 C. P., 56.

(*) Law Rep., 3 Ex., 114.

(*) Law Rep., 5 Q. B., 218.

(*) Law Rep., 6 Q. B., 214.

(10) 8 Bli. (N.S.), 690; 3 B. & A., 77.

nall v. The Ryde Commissioners ⁽¹⁾; *Couch v. Steele* ⁽²⁾. Where a duty is created by statute, if there is a penalty attached, no action lies unless expressly given by the statute: *Atkinson v. Newcastle and Gateshead Waterworks Company* ⁽³⁾. Where a statute gives a power to do an act, and a power to raise tolls in order so to do, a duty arises to every individual from whom a toll is taken: *Winch v. Conservators of Thames* ⁽⁴⁾. A mere power to do an act is not sufficient to impose an obligation to do it and confer a right of action for breach thereof by a party injured. In this case there was no statutable or common law duty to repair, there was merely a power to levy rates, without any imperative duty to apply the funds when raised to any specified object.

Mr. *Willis*, Q.C., and Mr. *Thomas*, for the respondent: The evidence established that the streets and drains in question were within the boundaries of the municipality; that the hole into which the respondent fell was caused by the 260] brickwork not *being repaired, and the rain tearing away the soil in consequence; that the appellants had suffered it to remain in a dangerous condition for two years; at the time of the accident there was neither light to warn nor railing to protect the respondent from peril. The whole question is whether, under these circumstances, there was any breach of duty on the part of the appellants for which an action will lie. It is submitted that under the Municipalities Acts of 1858 and 1867, the appellants were bound to keep the roads and drains within their boundaries in such a condition as not to be dangerous to life and limb. There was a duty to all persons generally, and therefore the corporation could be indicted: *Mayor and Burgesses of Lyme Regis v. Henley* ⁽⁵⁾.

No doubt if a duty is created for the first time by an act, and a remedy is given by that act, the plaintiff is confined to that remedy. But inasmuch as the obligation to repair roads and drains arises solely under the act in question in this case, if neither an indictment nor an action lies it would be a mere matter of discretion in New South Wales whether the roads were kept in good and proper order or not, and there would be no method of enforcing it. See the Act of 1867, sects. 119, 123, and 164. The duty here is imposed by statute, for the benefit of all, and therefore the respondent

⁽¹⁾ 4 B. & S., 361; 33 L. J. (Q.B.), 39.

⁽²⁾ 3 E. & B., 402; 23 L. J. (Q.B.), 121.

⁽³⁾ Law Rep., 6 Ex., 404; on appeal, 2 Ex. D., 441.

⁽⁴⁾ Law Rep., 7 C. P., 458; 3 Eng. R., 344; in error, Law Rep., 9 C. P., 378;

10 Eng. R., 212.

⁽⁵⁾ 8 Bli. (N.S.), 690, at pp. 714, 715.

has a right of action unless taken away by statute: *Coe v. Wise* ("). No case goes to the length that where a duty is cast by statute on a man, an action does not lie for special damages for the breach thereof. See *Henley v. Mayor of Lyme Regis* ("). *Couch v. Steel* is distinguished from *Atkinson v. Newcastle and Gateshead Waterworks Company* ("). Reference was made to *McKinnon v. Penson* ("); *Mersey Docks Trustees v. Gibbs* ("); to Baron Channell's judgment in *Young v. Davies* ("); to *Parsons v. Bethnal Green Vestry* ("); *Gibson v. Mayor of Preston* ("); *Parnaby v. The Lancaster Canal Company* ("). By this statute no remedy was provided for the breach of the duty imposed, and no words show an intention not to allow the common law remedy of indictment. A right to a new trial [261 arises because the Chief Justice ought to have left it to the jury whether there was not a misfeasance by the corporation. [SIR BARNES PEACOCK referred to *Barnes v. Ward* ("). [SIR ROBERT P. COLLIER: It is only necessary for you to say there was a duty to take such care of the roads as to afford security to life and limb to the public.] Reference was made to *Hardcastle v. South Yorkshire Railway and River Dun Company* ("); *Binks v. South Yorkshire Railway and River Dun Company* ("); *Cornwell v. Metropolitan Commissioners of Sewers* ("); *Hounsell v. Smyth* (") *Whitehouse v. Fellowes* (").

Mr. Boddam replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK: This is an appeal by the defendants from a decision of the Supreme Court of New South Wales, by which a verdict for the defendants was set aside and a new trial granted in an action brought by the respondent, who was the plaintiff, to recover damages under the circumstances which will be hereafter pointed out.

By an act of the Legislature for New South Wales, No. 12 of 1867, intituled "An Act to establish Municipalities," it was declared that the defendants, the municipality of Bathurst, had been legally constituted and incorporated under the provisions of the Municipalities Act of 1858 thereinbefore repealed, and that, for the purposes of the

(1) 5 B. & S., 464.

(2) 5 Bing., 101; S. C., 3 B. & A., 92.

(3) 8 E. & B., 111.

(4) 8 Ex., 327; 9 Ex., 609.

(5) Law Rep., 1 H. L., 98.

(6) 7 H. & N., 760.

(7) Law Rep., 3 C. P., 60.

(8) Law Rep., 5 Q. B., 218.

(9) 11 Ad. & E., 229.

(10) 9 C. B., 392.

(11) 4 H. & N., 67.

(12) 3 B. & S., 244.

(13) 10 Ex., 771.

(14) 7 C. B. (N.S.), 781.

(15) 10 C. B. (N.S.), 765.

said act of 1867, they should remain and be legally constituted and incorporated, and should be and be designated a borough.

By sect. 117 of the act, it was enacted that the council should, within the boundaries of the municipality, have the care, construction, and management of public roads other than the main roads of the colony, and of public streets, lanes, ferries, wharves, jetties, and public thoroughfares, except as thereafter mentioned.

The act gave powers to the council of any municipality 262] to *enter upon private lands under certain restrictions, to obtain materials for repairing roads, streets, &c. (sect. 119).

The council was empowered to make rates for, amongst other things, the repairs of the roads, &c., but such rates were not to exceed one shilling in the pound in the year upon the value of the ratable property to be assessed, as in the act mentioned, sect. 164; and they were also authorized to levy tolls, &c., sect. 179.

Sections from 120 to 124 inclusive were also cited as bearing upon the question of the duties and liabilities of the corporation in respect of roads.

There is no dispute as to the facts, which are thus stated in the appellants' own case:

"The plaintiff is a mining proprietor and commission agent, residing at Hill End, a town some distance from Bathurst. Between 2 and 3 A.M. on the morning of the 26th of March, 1876, the plaintiff was riding on his way home from Bathurst down a street within the municipality of Bathurst called Durham Street, the morning being dark and showery. On arriving at that part of Durham Street which is intersected by Hope Street, the plaintiff's horse fell into a hole and carried the plaintiff with him, crushing the plaintiff's leg against one side of the hole, and causing a compound fracture of his leg. This was the injury complained of.

"The place where the plaintiff was injured is in the suburbs of Bathurst, on the outskirts of the town, but within the municipality. Durham Street was originally constructed by the defendants, and, as constructed, was a well made street, a mile and a quarter long, and 99 feet broad, including the footpath. The roadway, exclusive of the footpath, is 75 feet wide. The end of Durham Street in which the hole was is not, and never was, curbed or guttered, but the pathway is formed. The hole into which the plaintiff's horse fell is an open drain, where the gutter should be, nearly perpendicular at the side

of the pathway running down Durham Street to Hope Street, and emptying itself into a barrel drain underneath the latter street. The heading of the barrel drain is covered over. Fifty yards from Hope Street, at its commencement, the drain is 2 feet deep, but deepens as it approaches Hope Street till, at the intersection of the two streets, it is 4 feet deep. The drain is *5 feet wide, and is not fenced. [263 The hole in question was caused by the brickwork of the drain having broken away, and, not having been repaired, the rain tore away the soil and caused the earth to work away." The barrel drain was constructed by the appellants, and it was stated by one of the plaintiff's witnesses that the hole had been for two years as deep as it was at the time of the accident.

The plaintiff commenced his action against the defendants in the Supreme Court of New South Wales, to recover damages against them for the injuries he had sustained. By the first count of his declaration he claimed damages for negligence in constructing the street, and, by the second count, for negligence in keeping and maintaining the street, and not repairing the drain, gutter, or sewer, in the said street. The defendants pleaded to the whole of the declaration the general issue. The action came on for trial in Sydney, before the Chief Justice and a jury of four persons, on the 1st of May, 1877. At the trial evidence, both oral and documentary, was adduced by the plaintiff in support of his case, and the above facts were proved. The defendants put in no evidence. In his summing-up, the Chief Justice directed the jury that the defendants, under their act of incorporation, were not liable for the result of any mere non-feasance; that if they thought fit to construct a sewer, and did the work in so negligent a manner as to bring about the accident, they were liable for that misfeasance, but if they constructed the sewer properly in the first instance, and it became defective afterwards, they were not bound to repair it; and further, that if the defective state in which the drain was arose from the operation of the weather or wear and tear, it having been properly constructed originally, they were not liable. The jury thereupon returned a verdict for the defendants. A rule *nisi* to set aside the verdict and for a new trial was granted by the said Supreme Court (consisting of the Chief Justice, Mr. Justice Hargrave, and Sir William Manning) on the following ground only, viz.:

"That the ruling and direction of his honor, the Chief Justice, that the plaintiff could not recover on the second

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count, on the ground that the defendants were not bound to repair or keep in repair was erroneous."

264] *No question therefore arises as to the first count.

On the 29th of June, 1877, the rule *nisi* was heard before the same learned judges, and the following order was made (the Chief Justice dissenting):

"It is ordered that the said rule be, and the same is hereby made absolute, and the verdict obtained herein set aside, and a new trial be had between the parties on all issues.

"And it is further ordered that the costs of the said plaintiff of and occasioned by the application for such new trial after taxation, be paid by the above named defendants."

Against this order the appeal is brought.

The learned Chief Justice has stated his reasons very fully in support of his opinion that there were no grounds for making the rule absolute. After referring to his ruling at the trial, he adverted to the importance of the question raised. He said: "No doubt this case raises a point of extreme importance, not only to this borough but to all the boroughs now or hereafter incorporated under the same act, viz., whether, whatever may be the state of the municipal funds, whatever the size of the municipalities (and some of these municipalities are very extensive), whatever may be the state of the streets when they are handed over, however much it may cost to put them in order, they are not liable at their peril to put them in a thorough state of repair, and to be sued by every person who may meet with any accident, however slight, through their neglect to repair.

"A municipality may have, as in this case, streets extending over seventy miles, and the rates may not return over £1,000 a year (the amount of rates that can be imposed being limited), and yet, if the plaintiff is right in his contention, it is bound with these limited means to put the whole of the streets in repair.

"I can see, if this action is decided against the defendants, that it will require speedy legislation to prevent such bodies from being financially ruined by actions like the present."

Mr. Justice Hargrave considered that the corporation, as the only body authorized to meddle with the roads, were bound by the act to repair them so long as they remained by their authority open to the public.

Sir William Manning did not think it necessary to inquire
265] *broadly into the obligations of a municipality to make all repairs of streets or roads which the general convenience of the public might demand, but confined himself

to the question which the facts of the case compelled him to decide.

With regard to the particular case it is clear that the hole was caused by an artificial work, viz., the barrel drain which was constructed by the council, and that the accident would not have occurred if that drain had not been made, or if it had been kept in repair so as to prevent the soil adjacent to the excavation made for the barrel drain from washing into it, and forming the hole in question. If the excavation for the barrel drain had not been made, the soil which was removed would have formed a support for the adjacent soil and prevented it from being washed away so as to form the hole. The brickwork which formed the wall to the drain, so long as it was in repair, supported the adjacent soil and prevented it from being washed into the excavation.

This being the state of facts, their Lordships do not think it necessary to decide whether it was the intention of the Legislature to throw upon the municipality the obligation of keeping in general good repair the roads and streets placed under its management. The question upon these facts is, whether the municipality having constructed the barrel drain was not bound to keep it in a state of repair which would prevent its causing a dangerous hole to be formed in the highway. Having, under the statute, the care, construction, and management of the roads and streets, the construction of the barrel drain by the appellants was lawful; and the care and management of the roads being vested in them, the drain was in their control, and they had full power to repair or otherwise deal with it. Their Lordships are of opinion that, under these circumstances, the duty was cast upon them of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway which, but for such artificial construction, would not have existed, or, at least, of protecting the public against the danger, when it arose, either by filling up the hole or fencing it. Supposing the top of the barrel drain across Hope Street had fallen in, leaving a dangerous hole in the middle of that street, it would surely have been the duty of the appellants to take steps to prevent persons *falling into the trench which they had originally [266 dug; and there would seem to be no substantial difference in the liability between a hole which had been directly made by them, and one which is the indirect but natural consequence of the artificial work they had created and had not properly kept. In the case of *Whitehouse v. Fel-*

lowes ('), which was an action against the trustees of a turnpike road, the defendants had converted an open drain in the road into a covered one, the effect of which was that flood water would be thrown on the adjacent lands, unless certain catchpits which were, at the same time made to prevent this mischief, had been properly constructed and afterwards kept in proper order. The landowner having brought an action and recovered damages for the injury arising from an overflow, it was held that the learned judge at the trial had rightly directed the jury to find for the plaintiff if they thought the catchpits were insufficiently constructed, or were kept in an insufficient and improper manner. In that case the trustees were held liable for an injury which was the indirect but natural consequence of their own artificial work which they had not taken proper means to avert.

In a recent case of *White v. Hindley Local Board of Health* ('), the facts were these: The plaintiff was riding along a highway, under which was a sewer, his horse trod on a grid or grating put there to drain the surface water from the road into the sewer. The grid being in a defective state, for want of repair, gave way, and the horse's leg was injured. It was held that the defendants were liable to the plaintiff for the damage done to the horse. The court, in sustaining the action, assumed that the placing of the grid over the opening of the sewer was done with two objects, the one to prevent the hole from being dangerous to those using the road, and the other to prevent stones and other matters from passing into the sewer; and without saying that the defendants (the local board) would be liable as surveyors of highways, the court held that as the sewers were vested in them they were liable "at all events in their capacity of owners of the sewers."

In the present case the barrel drain, even if the property of it did not belong to the appellants, was not only made by the appellants, but the sole control and management of it were, 267] by the *statute, vested in them; and in their Lordships' view these circumstances threw upon them a duty of a similar kind to that which was held to exist in the case just cited.

Their Lordships are therefore of opinion that the appellants, by reason of the construction of the drain, and their neglect to repair it, whereby the dangerous hole was formed, which was left open and unfenced, caused a nuisance in the highway, for which they were liable to an indictment.

This being so, their Lordships are of opinion that the cor-

(') 10 C. B. (N.S.), 731.

(') Law Rep., 10 Q. B., 219; 12 Eng. R., 275.

poration are also liable to an action at the suit of any person who sustained a direct and particular damage from their breach of duty: *Henley v. Mayor and Burgesses of Lyme Regis* (*). In that case the rule was clearly laid down by Lord Tenterden. He said, "We think the obligation to repair the banks and sea shores is one which concerns the public, in consequence of which an indictment might have been maintained against the plaintiffs in error (i.e., the corporation, defendants) for their general default; from whence it follows that an action on the case will lie against them for a direct and particular damage sustained by an individual, as in the case of a nuisance in a highway by a stranger digging a trench, &c., or by the act or default of a person bound to repair *ratione tenuræ*. An indictment may be sustained for the general injury to the public, and an action on the case for a special or particular injury to an individual."

The general rule was also enunciated by the Lord Chief Baron Pollock, in the case of *McKinnon v. Penson* (*). He said, "There is no doubt of the truth of the general rule that where an indictment can be maintained against an individual or corporation for something done to the general damage of the public, an action on the case can be maintained for a special damage thereby done to an individual, as in the case of a nuisance in the highway by a stranger digging a trench across it, or of the default of a person bound to repair *ratione tenuræ*."

In their Lordships' opinion there is no principle upon which a distinction in this respect between nonfeasance and misfeasance can be supported.

*In the case above cited of *Henley v. Mayor of Lyme* [268 *Regis* (*), Lord Wynford, then Chief Justice Best, with reference to the liability of the corporation for the non-repair of the sea-wall, said, "I take it to be perfectly clear that if a public officer abuses his office, either by an omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer. The instances of this are so numerous that it would be a waste of time to refer to them."

It is scarcely necessary to remark that where a duty is created, for the benefit of the public, by act of Parliament, and a specific remedy is thereby provided for a breach of the duty, it must be a question of construction whether the specific remedy was intended to be substituted for or to be

(*) 5 Bing., 101; S. C. in error, 8 B. & A., 77, and in the House of Lords, 8 Bl. (N.S.), 690.

(*) 8 Ex., 327.

(*) 5 Bing., 107.

provided in addition to the common law remedy by an indictment for the public, or by action for an individual who sustains a special or particular injury: see the case of *Atkinson v. Newcastle Waterworks Company* (*).

The principal objection taken by the learned Chief Justice in New South Wales, and by the learned counsel for the appellants here, to the maintenance of the action was founded upon the nature of the supposed obligation, viz., a liability to repair public roads, and upon the authority of the case of *Russell v. The Men of Devon* (*), and of some others *in part materia*. In those cases the principal objection to the maintenance of the action was that the inhabitants of the county or parish, as the case might be, were not a corporation capable of being sued as such. There are no doubt *dicta* to the effect of the inconvenience that might result from the multiplicity of actions and increase of litigation, if it were held that every individual aggrieved by the non-repair of a public road might sue either the county or parish or individual members of it; but such inconvenience was never admitted as a reason why an action should not be maintainable.

Another class of cases relied upon consists of those in which (as in *McKinnon v. Penson*, above cited, *Harris v. Baker* (*), and *Parsons v. Vestry of St. Matthew, Bethnal Green* ()), it was held that such an action could not be 269] brought against a surveyor of *highways appointed under the 43 Geo. 3, c. 59, or a vestry appointed under the Metropolis Local Management Act, 18 & 19 Vict. c. 120. But the ruling principle of all these last decisions seems to be that it was not the intention of the Legislature to create by the particular statute a new liability, but merely to transfer existing powers; and, consequently, that if an action would not lie against the county or parish, or other superior body, it would not lie against the surveyor, functionary, or other creature of that statute. Without going at length through the numerous cases that have been cited on either side, their Lordships think it sufficient to say that this municipality has original and not merely transferred powers, and therefore does not fall within the class of cases referred to. It more nearly resembles the public body held liable to an action in *Hartnall v. Ryde Commissioners* (*), a decision which has been recognized as sound law in several later cases. It was there held that the statute creating the commissioners having expressly imposed upon them the obligation of re-

(1) 2 Ex. D., 441; 21 Eng. R., 541.

(*) 4 M. & S., 27.

(2) 2 T. R., 667.

(*) Law Rep., 3 C. P., 56.

(*) 5 B. & S., 361.

pairing the roads, they were liable not only to be indicted for a breach of that duty, but to be sued by anybody who could show that by reason of such breach of duty he had sustained particular and special damage. In their Lordships' opinion no substantial distinction can be taken between that case and the present, in which the duty for the reasons above stated has been found to exist, though not expressly imposed by statute.

For the above reasons their Lordships are of opinion that the majority of the judges were correct in holding that the rule for a new trial ought to be made absolute. They will therefore humbly advise Her Majesty to affirm the order of the court below, and to dismiss the appeal. The appellants must pay the costs of the appeal.

The question whether it was the intention of the Legislature to throw upon the municipality the obligation to keep all the roads under the care and management of the council in a complete state of repair is, as remarked by the learned Chief Justice, one of extreme importance, not only to the borough of Bathurst, but to all the municipalities which now are, or hereafter may be incorporated by the same act.

*It will be very desirable, in their Lordships' opinion, [270] that the attention of the Legislature should be drawn to the difference of opinion which exists as to the construction of the act, with reference to the general liability to repair, in order that they may, if they deem it expedient, set the matter of their intention at rest for the future.

Solicitors for the appellants: *Wilde, Berger, Moore & Wilde.*

Solicitors for the respondents: *Webster & Graham.*

See 16 Eng. R., 378 note; 21 id., 811 note; *Moak's Underhill on Torts*, 231-3; 32 Eng. R., 850 note.

A municipal corporation is liable for an injury to a traveller over a public highway, if he be injured by an excavation made by an individual, if it have existed so long that such corporation is bound to take notice thereof: 16 Eng. Rep., 373 note.

But see *Kingston v. McDermott*, 19 Hun, 198, reversing 6 Abb. N. C., 246.

So for an excavation made by workmen of the corporation and not sufficiently barricaded or lighted: *Sevestre v. New York*, 47 N. Y. Super. Ct. R., 341.

Otherwise, if removed by wrongful act of third persons: *Sevestre v. New*

York, 47 N. Y. Super. Ct. R., 341; *Parker v. Cohoes*, 10 Hun, 531, 74 N. Y., 610; *McDermott v. Kingston*, 19 Hun, 198, reversing 6 Abb. N. C., 246.

A municipal council is indictable, as for a public nuisance, for leaving a dangerous hole unguarded in a public road, under its care and management, and partly formed by it; and is therefore liable for injuries sustained by a horse of the plaintiff in falling into such hole, though the horse was trespassing on such road, and the plaintiff may have been guilty of contributory negligence in allowing it to stray: *Smyth v. President, etc.*, 8 Vict. L. R. (Law), 231.

One who makes an excavation or hole in a sidewalk is liable if a passer by be

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injured by a defect therein. The person making it must see to it that the street is restored to its original safety and usefulness: *Clifford v. Dam*, 81 N. Y., 52, affirming 44 N. Y. Super. Ct. R., 391; *McGuire v. Spence*, 16 N. Y. Weekly Dig., 222; *Sexton v. Zett*, 44 N. Y., 430.

So, to a child playing in the streets: *McGuire v. Spence*, 16 N. Y. Weekly Dig., 222.

So one who removes a sidewalk, curb and gutter in excavating for a building, is bound to supply as good a conduit for surface water as he takes away, and failing to do so is liable to the owners of adjacent premises for injuries to property therein, resulting from such omission; and this though such removal be made with permission of the municipal authorities: *Mairs v. Manhattan, etc.*, 47 N. Y. Super. Ct. R., 31, 89 N. Y., 498; *Pettis v. Johnson*, 56 Ind., 139.

Notice to a policeman is notice to the city: *Repberg v. New York*, 16 N. Y. Weekly Dig., 178, 23 Daily Reg., 337.

But as to alderman, see *McDermott v. Kingston*, 19 Hun, 198, reversing 6 Abb. N. C., 246.

A conductor pipe, designed to convey water from the roof of a building in a city to the ground, when constructed with due care and proper precaution, and in the absence of a municipal ordinance forbidding the discharge of water in this manner, is not in itself unlawful, and cannot be deemed a nuisance even if it discharges upon the sidewalk.

Where a person acquires title to land upon which is a nuisance, the mere omission to abate or remove it does not render him liable; there must be something amounting to actual use, or a request to abate the nuisance must be shown.

The owner of certain premises in the city of B. built thereon two houses, numbered respectively 18 and 20, with a porch extending along in front of both, through the roof of which, on the division line, between the two lots, was a pipe, or leader, which descended to the sidewalk on No. 18, just inside of if not upon said line. Defendant purchased No. 18, and so changed the roof of its porch that the water therefrom was discharged another way and none

of it reached the pipe in question. Water from No. 20 passed through the pipe on to the sidewalk in front of No. 18 and there froze. Plaintiff slipped upon the ice, fell and was injured. No. 18 was not at the time in the possession of defendant, but in that of his tenant. In an action to recover damages, held that defendant was not liable; that the pipe itself was not a nuisance, and in the absence of any municipal ordinance prohibiting this mode of carrying off water from a roof, it was not unlawful; but if so, as defendant neither erected it nor used it, he was not liable until requested to abate it: *Wenzlick v. McCotter*, 87 N. Y., 122, reversing 22 Hun, 60, distinguishing *Brown v. C. & S. R. R.*, 12 N. Y., 486, *Wasmer v. D. L. & W. R. R. Co.*, 80 id., 212, *Irvine v. Wood*, 51 id., 224, *Clifford v. Dam*, 81 id., 56, *Walsh v. Mead*, 81 Hun, 387.

The general statute of Rhode Island provides, that "in all cases in which the death of any person ensues from injury inflicted by the wrongful act of another, and in which an action for damages might have been maintained at the common law had death not ensued, the person inflicting such injury shall be liable to an action for damages for the injury caused by the death of such person, to be recovered by action of the case for the use of his or her husband, widow, children, or next of kin, in like manner and with like effect as in the preceding five sections provided."

Held, that this gives no action against a defendant who is only charged with passive neglect or a mere omission of duty.

F. owned, and for purposes of repair controlled, a yard occupied by a tenant. In the yard was a cistern, on which F. had put a proper iron cover. This was removed without the knowledge of F. and a wooden cover weighted with a stone, but claimed to be insecure, was substituted. A child three years old, living in a tenement, the yard of which was contiguous to F.'s yard and connected with it by an open gateway, fell into the cistern and was drowned.

In an action by the administrator of the child against F., brought under Gen. Stat. R. I., chap. 193, § 21, held that F. was not liable: *Bradbury v. Furlong*, 13 R. I., 15.

[4 Appeal Cases, 270.]

J.C.(*), Feb. 18, 19, 20; March 28, 1879.

[PRIVY COUNCIL.]

BANK OF NEW SOUTH WALES, *Defendant*; and WILLIAM OWSTON, *Plaintiff*.

ON APPEAL FROM THE SUPREME COURT OF SOUTH WALES.

Principal and Agent—Authority of Bank Manager to prosecute on behalf of Bank must be proved, not presumed—Liability of Bank for Malicious Prosecution by its Manager—Appealable Sum includes Adjudged Interest on a Verdict.

Although costs may not be added to the amount recovered in estimating the appealable sum, yet interest on a verdict, given by statute, payable from the time of obtaining such verdict until the time of entering up the judgment appealed from, and included in such judgment, is to be considered in estimating such appealable sum.

In an action for a malicious prosecution against an incorporated banking company the jury found that the same had been authorized on behalf of the bank by W., the acting manager, and were directed by the judge that it was to be inferred from W.'s position as manager that he had sufficient power under the circumstances for directing a prosecution.

A rule *nisi* to enter a nonsuit or for new trial was discharged:

Held, on appeal, that assuming the prosecution to have been authorized by W., the direction to the jury to the effect that it was to be inferred from W.'s position that he had authority to direct the prosecution was on the evidence incorrect.

The arrest, and still less the prosecution of offenders, is not within the ordinary *routine of banking business, and therefore not within the ordinary scope of [271] a bank manager's authority. Evidence accordingly is required to show that such arrest or prosecution is within the scope of the duties and class of acts such manager is authorized to perform. That authority may be general, or it may be special and derived from the exigency of the particular occasion on which it is exercised. In the former case it is enough to show commonly that the agent was acting in what he did on behalf of the principal; but in the latter case evidence must be given of a state of facts which shows that such exigency is present, or from which it might reasonably be supposed to be present.

Rule made absolute for a new trial.

APPEAL from a judgment of the Supreme Court (Hargrave and Manning, JJ., Martin, C.J., dissenting), discharging a rule *nisi* obtained on the 6th of June, 1876, to set aside a verdict for the respondent for £500 and costs, and enter a nonsuit, or for a new trial in an action brought by the respondent against the appellants for malicious prosecution.

The circumstances out of which the action arose are sufficiently stated in the judgment of their Lordships.

The action was brought on the 23d of March, 1876, against the appellants for having maliciously and without reasonable or probable cause procured the granting of the summons issued against the respondent. It was tried before Mr.

(*) *Present*:—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

Justice Manning, and on the 15th of May, 1876, a verdict was found for the respondent for £500 damages. The jury found specially that the proceedings were authorized by Mr. Wilkinson on behalf of the bank; and the learned judge reserved leave to enter a nonsuit on the ground that an action for malicious prosecution is not maintainable against a corporation.

On the 6th of June, 1876, the appellants obtained a rule *nisi* to enter a nonsuit pursuant to the leave reserved, or for a new trial on the following grounds:

1. That his honor, it is submitted, was in error in directing the jury that all the acts of the bank's solicitors (Messrs. Allen, Bowden & Allen), or any of them or their clerks were, as regards the prosecution of the plaintiff, in law the acts of the bank for which the bank was responsible, although the bank and its officers did not know of such acts or anything about them.

2. That his honor, it is submitted, was in error in directing the jury that the acts of Mr. Wilkinson, the acting 272] manager of *the bank, were, as regards the said prosecution, the acts of the bank, for which the bank was responsible.

3. That the special finding of the jury (that Mr. Wilkinson authorized the prosecution) is against evidence, and it is submitted has no evidence whatever to support it.

4. That there was not evidence to allow of a jury finding that the prosecution of the plaintiff was in fact or in law a prosecution by the bank, and that his honor ought to have directed the jury that upon the evidence Allen, Bowden & Allen alone were liable, and therefore the verdict, it is submitted, is against law.

The decision of Manning, J., at the close of the evidence that the prosecution had been without reasonable or probable cause was not questioned, neither was the finding of the jury as to the existence of malice.

As regards the point on which leave was reserved to enter a nonsuit, the Chief Justice held that "Malice being essentially a state of mind cannot be attributed to a corporation which has no mind." The other two judges held that the existence of malice in the minds of the servants or agents of a corporation is sufficient, and referred to the fact that numerous actions have been brought in England against incorporated companies in which it was necessary to prove malice, where the objection that malice could not be attributed to a corporation had not been taken.

Upon the first ground for a new trial mentioned in the rule

nisi, Manning, J., said: "There was a further question at the trial whether the bank might not have been liable in respect of the act of their solicitors independently of proof of express authority by the manager. Upon that point I told the jury that I had very great doubts; but I invited them to assume such liability subject to the opinion of the court in banco, in order that there might be an assessment of damages contingent upon that opinion, but I also stated that this view of the case would become immaterial if they should find that the bank manager had given actual instructions for the prosecution. As they found that fact, and as the court now upholds their finding, it has become unnecessary to discuss this part of my direction. Nor was the subject argued before us so as to demand a decision."

Upon the second ground mentioned in the rule *nisi* the Chief Justice said: "Managers, acting managers, [273 and clerks of a banking corporation cannot be presumed to be the agents for such corporations, except for the transaction of the ordinary business for which they were instituted, and criminal prosecutions constitute no portion of such business. For the apprehension of persons uttering forgeries and committing other criminal acts under the immediate observation of any clerk or servant of a bank, every such clerk or servant has, as one of the public, the power on his own responsibility to apprehend, or cause to be apprehended, the person so committing the offence. The corporation can only become responsible by a recognition of the act by its governing body at the least, or by an authority under its common seal." The other judges held that a bank manager must necessarily have authority to take steps for the prosecution and apprehension of persons believed to have stolen the bank's property, as there would often not be time to obtain the authority of the directors for a prosecution.

As regards the third and fourth grounds for a new trial mentioned in the rule *nisi* the Chief Justice concurred with the other members of the court in holding that there was evidence enough to warrant the jury in finding that the proceedings were not taken by Allen, Bowden & Allen on their own motion, but were authorized by Mr. Wilkinson, acting in the capacity of manager.

Mr. *Benjamin*, Q.C., and Mr. *J. C. Mathew*, for the appellants.

Mr. *McIntyre*, Q.C., and Mr. *J. D. Wood*, for the respondent.

Mr. *Wood* submitted that as the verdict was for £500 and no more, the Supreme Court had no power, having regard to

the Order in Council, of the 13th of November, 1850, to grant leave to appeal. In ascertaining the appealable amount, interest on the verdict is no more to be included in the calculation than costs are; and as regards costs see *Doorgadoss Chowdhry v. Ramanath Chowdhry* ⁽¹⁾; *Gooroopershad Khoond v. Juggutchunder and another* ⁽²⁾. [SIR MONTAGUE E. SMITH: That case shows that interest decreed may 274] be added to the principal, not interest on *decree, and that would be sufficient in this case to make it appealable.] But see *Boswell v. Kilborn* ⁽³⁾; *Quebec Fire Assurance Company v. Anderson* ⁽⁴⁾. In the Colony of Victoria it has been held that interest is not to be considered in estimating the appealable amount ⁽⁵⁾.

The appellants were not called upon.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH: In this case an objection has been made to the leave granted by the Supreme Court of New South Wales to appeal to Her Majesty on the ground that the sum involved is below the appealable amount. By the Order in Council of the 13th of November, 1850, which regulates appeals from the Supreme Court of New South Wales, an appeal is given from any final judgment, decree, order, or sentence of the Supreme Court, subject to certain regulations and limitations, the first being that such judgment, decree, order, or sentence shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of £500 sterling.

In the present case the action was for malicious prosecution, and the damages were laid at £5,000. On the trial the jury found a verdict for the plaintiff, with £500 damages. A rule *nisi* was applied for to set aside that verdict, which was granted, but upon argument discharged by the court. The rule was discharged on the 12th of March, 1877, and on the 30th final judgment was entered up as follows: "Judgment after verdict for the plaintiff, damages £500; interest on the above amount from the date of verdict, 15th May, 1876, to date, £33 1s. 11d.; taxed costs, £317 12s. 10d."

It is plain from previous decisions of this tribunal that the costs may not be added to the amount recovered in estimating the appealable sum; and it is now contended at the bar that interest on the sum awarded by the verdict ought 275] not to be added. Their *Lordships, however, think that interest under the laws existing in New South Wales

⁽¹⁾ 8 Moo. Ind. App. Ca., 262.

⁽²⁾ 8 Moo. Ind. App. Ca., 166.

⁽³⁾ 12 Moo. P. C., 467.

⁽⁴⁾ 18 Moo. P. C., 477.

⁽⁵⁾ *M'Swain v. M'Millan*, 4 Vict. L. Rep. (Law), 271.

is to be considered in estimating the amount. Interest on a verdict is given by the statute, 24th of Victoria, No. VIII, the 1st section of which enacts that, "Every plaintiff who shall hereafter obtain a verdict in an action in the Supreme Court, upon which he shall hereafter obtain judgment, shall be entitled to interest at the rate of eight per centum per annum on the amount of such verdict from the time of obtaining such verdict until the time of entering up judgment thereon, and the amount of such interest shall be included in the judgment." The interest, therefore, is payable upon the amount of the verdict from the time of obtaining it until the time of entering up the judgment. It is to be included in the judgment, and forms part of it.

What, then, is the sum "at issue," to use the words of the Order in Council, in the present appeal? The verdict is only a step toward the judgment. The sum cannot be recovered upon the verdict, but is recovered in execution upon the judgment. The foundation of the judgment is the verdict, and the rule that was obtained to set aside that verdict must be understood as involving the whole sum which the verdict would carry, and which would be included in the judgment. That sum is not the original sum only, but, by virtue of the statute, that sum and interest.

A similar question was before this tribunal in certain appeals from India, and the judgment given on it will be found in 8th Moore, Ind. App. Cas. The part which is material is at page 168. "Where the appeal is from the whole decree, and the decree has given an amount, including interest up to the date of the decree, which exceeds Rs.10,000, it is clear that the matter which is in dispute in the appeal must exceed the sum of Rs.10,000; for the question to be tried upon the appeal must be whether the decree is or is not right; that is to say, whether the decree has or has not properly ordered payment of a sum exceeding Rs.10,000. Where, therefore, at the date of the judgment the sum which is recoverable under the decree of the Sudder Court is an amount exceeding Rs.10,000, there, in their Lordships' judgment, the case clearly falls within the terms of the Order in Council." In the same judgment their Lordships state that they "must not, of *course, be understood to [276 intimate that the Sudder Courts ought to give leave to appeal in cases in which the specified amount of Rs.10,000 can only be reached by the addition of interest subsequent to the decree." Here their Lordships think that the sum involved in the judgment appealed from does exceed, for the reasons

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they have stated, the sum of £500, and they are therefore of opinion that the appeal ought to proceed.

Mr. *Benjamin*, Q.C., and Mr. *Arbuthnot* (Mr. *J. C. Mathew*, with them), for the appellants: It is admitted that the plaintiff in this case is entitled to damages, and that the prosecution was without reasonable and probable cause, and therefore malicious. And the point that an action will not lie against a corporation aggregate for malicious prosecution, is given up. It is contended that the plaintiff has chosen a wrong defendant, and that the bank had nothing whatever to do with the prosecution complained of. It is contended on the evidence, that the authority to the solicitors who prosecuted did not emanate, as alleged, from Wilkinson, the acting manager of the bank; otherwise, that it was not within the scope of his authority to give orders to that effect.

Upon this latter point it was submitted that where a particular power is vested in a company, and a particular officer is placed to carry out that power, the company is liable; but where it has not so placed a particular officer, a subordinate one cannot bind the company, which must be taken to have delegated the power exclusively to some special officer. See *Eastern Counties Railway Company and Richardson v. Broom* (¹); *Roe v. Birkenhead, &c., Railway Company* (²). Then is it part of the ordinary authority of a manager to institute criminal prosecutions? See *Goff v. Great Northern Railway Company* (³), and *Walker v. South Eastern Railway Company* (⁴), where the subject is more fully discussed than in *Giles v. Taff Vale Railway Company* (⁵). In *Poulton v. London and South Western Railway Company* (⁶) the *question was treated as one of evidence of implied authority on which the jury might found a verdict. Here the evidence was kept from the jury, and the judge directed them that the acts of the manager were the acts of the bank. Reference was made to *Walker v. South Eastern Railway Company* (⁷); *Edwards v. London and North Western Railway Company* (⁸); *Allen v. London and South Western Railway Company* (⁹); *Moore v. Metropolitan Railway Company* (¹⁰); *Lord Bolingbroke v. Swindon Local Board* (¹¹); *Green v. General Omnibus Company* (¹²).

(¹) 6 Ex., 814.

(²) 7 Ex., 76.

(³) 3 E. & E., 672.

(⁴) Law Rep., 5 C. P., 640.

(⁵) 2 E. & B., 822.

(⁶) Law Rep., 2 Q. B., 534.

(⁷) Law Rep., 5 C. P., 640.

(⁸) Law Rep., 5 C. P., 445.

(⁹) Law Rep., 6 Q. B., 65.

(¹⁰) Law Rep., 8 Q. B., 36; 4 Eng. R., 203.

(¹¹) Law Rep., 9 C. P., 575; 10 Eng. R., 315.

(¹²) 7 C. B. (N.S.), 290.

Mr. *McIntyre*, Q.C., and Mr. *J. D. Wood*, for the respondents: The appellant corporation was expressly authorized by the act under which it was incorporated, 14 Vict. 1850, s. 1 (see 4 Victorian Statutes (fo. ed.), p. 55), to institute criminal proceedings; otherwise it would possess such authority at common law. The question is whether such authority can only be exercised, as contended on the other side, by the general manager or the board of directors. [SIR ROBERT P. COLLIER: In the absence of the deed of settlement we are without information as to the powers of the directors or of any of the officers of the corporation.] In the absence of the deed it must be assumed that there was no express provision relative to prosecutions. The practice of the bank must be taken as showing the rules of the corporation. That juries may be presumed to be acquainted with the duties of certain officers, see *Giles v. Taff Vale Railway Company* (*), per Platt, B., approved by the full court in *Moore v. Metropolitan Railway Company* (*), per Blackburn, J. [SIR BARNES PEACOCK referred to sect. 24 of 14 Vict. 1850, which says that the common seal of a corporation need not be used "for the appointment of an attorney or solicitor for the prosecution . . . of any . . . proceeding."] The case of *Eastern Counties Railway Company v. Broom* (*) is of very little authority against the respondent; see *Goff v. Great Northern Railway Company* (*); *Edwards v. London and North Western Railway Company* (*) was decided on the ground that the prosecution was instituted by a subordinate officer: see judgment of Montague Smith, J. *Allen v. London and South Western Railway Company* (*) was decided on the ground that it was a penal prosecution which had been instituted, not one the object of which was to recover back the property; the property was no longer in jeopardy and therefore the clerk had no longer authority. Here the object was to get possession of the property. [SIR ROBERT P. COLLIER: I cannot subscribe to the principle that an authority arises to put the criminal law in motion in order to get restitution of property, where admittedly it does not arise for a more legitimate purpose.] Assuming that there was some evidence that the manager had authority in this case, was there misdirection? It is not every misdirection which will entitle the parties to a new trial. The judge may assume that the controversy is not as to the fact but as to the law; if he assumes it erroneously, being misled

(*) 2 E. & B., 822.

(*) 6 Ex., 814.

(*) Law Rep., 8 Q. B., 36; 4 Eng. R.,

(*) 3 E. & E., 672.

203.

(*) Law Rep., 5 C. P., 445.

(*) Law Rep., 6 Q. B., 65.

by the parties, that is no ground for a new trial. The evidence given was merely to fortify the legal presumption of authority. [SIR MONTAGUE E. SMITH: If you admit the defendants' evidence, then there ought to have been a non-suit, if you do not, it should have been left to the jury. SIR BARNES PEACOCK: When the defendants objected that there was no evidence of authority, the judge said in effect, I think there is, but as its effect is disputed, I will not put it to the jury but decide it myself.] As to the authority of a manager, on this subject, see *Mackay v. Commercial Bank of New Brunswick* (*). It was within the scope of Wilkin-son's authority to prevent the respondent from absconding. See also *Bank of British North America v. Strong* (*).

Mr. Arbuthnot replied.

March 4. The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH: This is an action for a malicious prosecution brought against the Bank of New South Wales, an incorporated company.

279] *The circumstances leading to the prosecution, which it is now admitted was groundless, are the following:

In March, 1876, a bill at thirty days' sight for £1,500 was drawn by Messrs. Morgan, Connor & Glyde, a firm trading at Adelaide, in South Australia, upon the plaintiff, Mr. Owston, a merchant trading at Sydney under the firm of Owston & Co. The bill was drawn against a consignment of wheat shipped on board the *Sea Gull*, and was sent with the shipping documents by the Adelaide branch of the defendant bank to the head bank at Sydney.

On Saturday, the 18th of March, the bank left the bill with the plaintiff for acceptance. He wrote his name upon it, but it was not called for until the morning of Tuesday the 21st. Meanwhile, on the afternoon of Monday, the 20th, the plaintiff had received the following telegram from the drawers: "*Sea Gull put back leaky*;" and on the same afternoon he telegraphed in reply, "Do you wish us to accept draft, or will you instruct extension of sixty days?" On the morning of Tuesday, the 21st, about 11 o'clock, a clerk from the bank called for the bill, and the plaintiff showed him the telegrams. He did not give the bill to him, but sent a clerk to the bank to explain the matter, and it was arranged that the bank should wait until 1 o'clock for the return of the bill. About that hour, and before the plaintiff had received an answer to his telegram, he returned

(*) Law Rep., 5 P. C., 398, 410; 9 Eng. R., 202.

(*) 1 App. Cas., 307.

the bill to the bank, having previously cancelled his acceptance. In the afternoon of the same day the following telegram from Adelaide reached the plaintiff: "Bank instructed extend draft to sixty days." A telegram to the same effect was received by the bank.

The bill, when returned to the bank by the plaintiff, was sent on the same afternoon by Hobbs, one of its clerks, to Messrs. Allen, Bowden & Allen, who are notaries, and also solicitors of the bank, to be presented by them for noting, and what took place with respect to this presentment produced the misunderstandings which led to the prosecution complained of.

On the following day, Wednesday, the 22d, a clerk of Messrs. Allen & Bowden, a lad called Muir, brought the bill to the plaintiff for acceptance. The plaintiff's evidence is to the effect that he understood the lad to be one of the bank clerks, and having in his mind the telegrams as to the alteration of the days of *sight, he inquired of him [280 how the bank wished the acceptance to be. The clerk said he knew nothing about that. The plaintiff then told him that he would accept the bill and send it round to the bank, and it was left with him. Shortly afterwards Bishop, another clerk of Messrs. Allen & Bowden, came for the bill, and demanded to have it returned. According to the plaintiff's evidence, he was not aware that Bishop was other than a bank clerk. He says that he again inquired how the bill was to be accepted, and told Bishop he would accept and send the bill to the bank. He says Bishop behaved in a violent manner and declared that he should treat what he had said as a refusal to return the bill. The plaintiff's account of these conversations is contradicted, but for the purpose of this general statement may be assumed to be correct. The plaintiff, in fact, soon after sent the bill to the bank accepted, having first made it payable at sixty days' sight, and it appears to have reached the bank about 1 o'clock.

Unfortunately the fact of the return of the bill was not communicated by the bank to Messrs. Allen & Bowden, as it ought to have been, and they remained under the impression that the plaintiff was still keeping it in his possession. Another interview took place between Bishop and the plaintiff; they met in the street. The plaintiff declined to have anything to say to Bishop, and unfortunately did not tell him what would have prevented further trouble—that the bill had been sent to the bank. Bishop said, on parting, that he would go for the police. A consultation was held

in Messrs. Allen & Bowden's office, and apparently, on the assumption that the plaintiff was improperly withholding the bill, and that they as notaries were responsible to the bank for its return, it was resolved to take criminal proceedings. Bishop and Muir then went to the police magistrate and applied for a warrant to apprehend the plaintiff on the charge of stealing the bill. The magistrate refused to grant a warrant, but issued a summons to the plaintiff to appear on the next day to answer a charge of feloniously stealing a bill of exchange of the value of £1,500, the property of the bank. The information was laid by Muir. As soon as he was served with the summons, the plaintiff went to the bank, and after inquiring for the general manager, who was engaged, saw Mr. Wilkinson, the acting manager, and com-
281] plained *to him of the course which had been taken. There is great conflict of testimony as to what occurred at this interview, but an explanation then took place, and there seems no doubt that after the interview it was resolved not to press the charge. Application was made by the solicitors to the magistrate to be allowed to withdraw it, which was refused, and upon the case being called on the next morning, the plaintiff being present in obedience to the summons, no evidence was offered in support of the charge, and the case was dismissed.

The plaintiff then brought the present action against the bank.

On the trial Mr. Justice Manning properly held that the prosecution was without reasonable cause, and it was found by the jury to have been commenced from improper motives, and was therefore malicious. No question now arises on this part of the case.

The two questions which were mainly contested at the trial and argued at their Lordships' bar are: (1) whether the proceedings of Messrs. Allen & Bowden were authorized by Wilkinson on behalf of the bank; and (2) if they were, whether the bank was responsible for Wilkinson's acts. At the trial the jury specially found the first question in the affirmative. Upon the second question, the learned judge told the jury, according to his own statement of his direction, "that it was to be inferred from Mr. Wilkinson's position as manager that he had sufficient power under the circumstances for directing a prosecution," and the verdict passed in accordance with this ruling.

A rule *nisi* to enter a nonsuit or for a new trial was granted on the following grounds:

1. That the special finding of the jury (that Mr. Wilkinson

authorized the prosecution) was against evidence, and had no evidence to support it.

2. That the judge was in error in directing the jury that the acts of Mr. Wilkinson, the acting manager, were, as regards the prosecution, the acts of the bank for which the bank was responsible.

3. That there was no evidence that the prosecution was in fact or in law a prosecution by the bank.

This rule, after an argument before the Chief Justice, Mr. Justice Hargrave, and Mr. Justice Manning, was discharged. The court *was unanimous in refusing to disturb the [282 finding of the jury as to Wilkinson having authorized the proceedings; but on the question of the correctness of Mr. Justice Manning's ruling as to the responsibility of the bank for his acts, which that learned judge and Mr. Justice Hargrave sustained, the Chief Justice dissented from his colleagues.

One point argued in the court below was that the bank, being a corporation, could not in any case be liable to an action of this kind. The Chief Justice (the other judges taking the opposite view) held the law to be so, to use his own words, "on the plain ground that malice being a state of mind, cannot be attributed to a corporation which has no mind," and he relied on the judgment of Baron Alderson in *Stevens v. Midland Counties Railway Company and Lander* (¹), which, as reported, no doubt supports this view.

The learned counsel for the appellant (Mr. Benjamin) acknowledged that, after recent decisions, he could not support this broad proposition, and confined his argument to the two questions above indicated.

Upon the first of these questions, evidence was given on the part of the plaintiff of statements made by Wilkinson, in the conversation which took place when the plaintiff went to the bank to complain of the proceedings, to the effect that he had given instructions for them. This was wholly denied by Wilkinson. It appeared that Wilkinson was at the solicitors' office on the morning of the day on which the summons against the plaintiff was issued. But it was stated both by him and the solicitors that he was there on other business, and that whilst engaged with Mr. Bowden, Mr. Allen, who was attending to the matter of the bill, came in and mentioned that the plaintiff refused to give it up; upon which Wilkinson, having asked from whom he got the bill, and being told from Hobbs, the bill clerk of the bank, remarked,

(¹) 10 Ex., 352.

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"You got the bill from the bank, and will have to return it; you are responsible." They all denied that Wilkinson had given any instructions to the solicitors in the matter. Their Lordships are very much disposed to agree in the view expressed by Mr. Justice Manning, "that there is a great deal 283] of strong evidence for the *defendants to show that the solicitors acted on their own responsibility, and in defence of their own possession of the bill, in their capacity of notaries, and not for or on behalf of the bank." They cannot, however, say that there is not some evidence to support the finding of the jury on this question; and that finding having been sustained by the judgment of the court below, they intimated to the learned counsel at the close of the argument for the appellants that they should not feel justified in sending the case to a new trial upon this point, if it stood alone.

The point remaining for consideration, viz., the liability of the bank for the acts of Wilkinson, is of more general importance. The first question which arises on this point is, whether the direction of the learned judge to the jury to the effect that it was to be inferred from Wilkinson's position that he had authority to direct the prosecution—thus practically withdrawing the question from the jury—was correct, and their Lordships think that upon the evidence given at the trial it was not.

No proof was offered by the plaintiff of the position, duties, and powers of the acting manager; but the defendants examined him, and also the general manager, who gave the following evidence on the question of his authority:

"Mr. Wilkinson said:

"Mr. Shepherd Smith is general manager. I have been acting manager since August last. I have had no instructions from the board or general manager authorizing me to prosecute or bring actions, nor any instructions not to do so. It is not our practice; we go to a higher authority. I have had occasion to refer to the general manager when any occasion arose about bringing any action, or to the board. Since I have been acting manager have never taken criminal proceedings without authority of board. In a case where a man presented a check forged I have as accountant, and should now, take proceedings to arrest where we have to catch the man on the spot, only in such a case. I should do this as acting manager, or as assistant manager, accountant, or clerk."

The following is the judge's note of the evidence of Mr. Smith, the general manager:

"I have heard generally of the information against Mr. Owston. *I gave no instructions whatever; had not [284 heard a syllable about the matter. Mr. Wilkinson is acting manager. He had no instructions at all to take any criminal proceedings against anyone. Mr. Wilkinson's duties are the ordinary duties of a bank manager. The practice since I have been in the bank (twenty-two years) has been that no such proceedings shall be taken except by express instructions of the board.

"The board meets twice a week, ordinary and occasionally special meetings; a special meeting might possibly (*sic*) in an hour, and possibly in two hours. In the absence of the board it would be the duty of the acting manager to take the instructions of the general manager. Allen, Bowden & Allen have no general authority given to them expressly to take criminal proceedings unless specially instructed; they have no authority to bring any action or take any proceedings.

"Cross-examined by Mr. Stephen: I say practice for twenty years not to take proceedings to arrest or to summons without referring to the board. I have no direct recollection of any such case, but I think I can refer to such cases, criminal cases, in our minutes. I can recollect no case of any case of proceedings for stealing from the bank being referred first to the board, nor for forgery.

"By Mr. Butler: I got instructions once at a board meeting not to commence (stopped). I cannot say whether a single case of criminal proceedings since; I believe there have been some, but cannot recollect any one. There have been many criminal proceedings for embezzlement by officers.

"The manager or acting manager have not taken upon themselves to prosecute, but the board direct.

"*Subject to objections.* In case of civil proceedings, the practice is to take the board's instructions before any action is commenced; that has been the practice during all my time as administrator of affairs.

"Cross-examined by Mr. Stephen: I will not say that there have not been taken on P. notes without reference to the board; may have been so; will not say there may not have been hundreds of such cases within the last twenty years, nor 5,000; very improbable, most improbable. I will not say that instructions to *sue have not often been [285 sent between board days. I will not say that in cases in which property of bank taken and in danger of being lost unless arrest ordered, action has not been taken without reference to board.

"In such an emergency I should take the responsibility myself of violating the rule, whether it would be my duty or not."

Before considering the effect of this evidence, it will be convenient to refer to the series of authorities cited at the bar. They all related to the liability of railway companies for wrongful arrests by their servants. In each of the two earliest cases, *Eastern Counties Railway Company and Richardson v. Broom* (¹), and *Roe v. Birkenhead, &c., Railway Company* (²), the plaintiff, who had been arrested at a station for refusal to pay the fare demanded, brought an action for false imprisonment. In both the question arose as to the authority of the officers at the station to make the arrest, and in both it was held there was not sufficient evidence of such authority to go to the jury. The decision in the first of these cases, upon the insufficiency of the evidence for the consideration of the jury, is scarcely consistent with later authorities. In the last of them, Baron Parke thought there was no proof that the servant "had ever received any general authority from the company to arrest any person who did not pay his fare, nor was there any evidence of any course of dealing to show that, as a servant of the company, he was authorized to make any arrest on their behalf."

In the later cases a more particular inquiry was made into the character of the employment of the officer, whose acts were in question, and the nature of the duties intrusted to him.

In *Goff v. Great Northern Railway Company* (³) the plaintiff had been arrested for travelling on the line without a proper ticket by an inspector of the company acting under the direction of the superintendent of the station. By the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20, ss. 103, 104, a penalty is imposed on any person travelling on a railway without having paid his fare, with intent to defraud, and power is given to all officers and servants on behalf of 286] the company to apprehend such person. There was evidence that the superintendent was the person in supreme authority at the station, and the jury having found for the plaintiff, the court refused to set aside the verdict, on the ground that there was no evidence for their consideration. Mr. Justice Blackburn, in delivering the judgment of the court (⁴), observes: "The court thought that, as from the nature of the case the decision whether a particular passenger should be arrested or not must be made without delay,

(¹) 6 Ex., 314.

(²) 7 Ex., 36.

(³) 3 E. & E., 672.

(⁴) 3 E. & E., 681.

and as the case may be not of infrequent occurrence, it was a reasonable inference that in the conduct of their business the company should have on the spot officers with authority to determine, without the delay attending on convening the directors, whether a person accused of this offence should be apprehended." And the court held there was evidence for the jury that the persons who apprehended the plaintiff had such authority, observing that it was difficult to see why the company paid the police if the inspector of their police was not to act for them to this extent.

This case turns therefore on the considerations that the summary power of apprehension given for the protection of the company could only be exercised (practically) on the spot, and instantly, and that the officers who acted were the fittest and indeed the only representatives of the company on the spot who could exercise it, and upon these considerations it was held that the jury might infer the necessary authority.

In the later case of *Edwards v. London and North Western Railway Company* (*) it was held that there was no evidence of the officer who had made the arrest having such authority. There a foreman porter who had the superintendence of the station yard in the absence of the station-master, gave the plaintiff into custody on a charge of stealing timber which the foreman porter suspected to be the property of the company. The timber was in a van at the station. It did not appear that any timber was in the special charge of the foreman. The plaintiff was well known, and in fact a gateman in the service of the company. It was held that there was no evidence of implied authority arising from the foreman's position to give into custody persons whom he might suspect to have stolen the company's goods. The apprehension in *this case was [287 not in pursuance of any special duty intrusted to the servant, as to enforce laws or by-laws. The court recognized the distinction that in the case of such a duty, authority might under certain circumstances be presumed, but held that the general authority sought to be inferred from the position of the foreman could not be so presumed. Other decisions adopt this distinction. In *Moore v. Metropolitan Railway Company* (†) the facts of the case were held to bring it within the authority of *Goff Great v. Western Railway Company* (*).

The case of *Poulton v. London and South Western Rail-*

(†) Law Rep., 5 C. P., 445.

(*) Law Rep., 8 Q. B., 36; 4 Eng. R., 203.

(*) 3 E. & E., 672.

way Company ⁽¹⁾ was a peculiar one. The station-master had arrested the plaintiff for non-payment, not of his own fare, but that of his horse; the law giving power to detain only for the former. Although it appeared that the station-master acted in the belief that the law authorized the arrest, and that he was protecting the interests of the company, it was held that his act was not within the scope of his authority, since it could not be inferred that the company had authorized him to do an act which under no circumstances could be lawful, and which they had no power to do themselves.

A question in some respects similar to that decided in *Edwards v. London and North Western Railway Company* ⁽²⁾ arose in *Allen v. London and South Western Railway Company* ⁽³⁾. It is to be observed that although in both these cases the defendants happened to be railway companies, the questions involved in them might equally arise in the case of other masters. In the last it appeared that a clerk whose duty it was to issue tickets and put the money received in a till, which was kept under his charge, having given some money in change to the plaintiff, who objected to one of the coins, a dispute arose, and the plaintiff, it was alleged, put his hand into the till. The clerk thereupon seized the plaintiff and gave him into custody, and the next morning charged him before a magistrate with feloniously attempting to rob the till. Mr. Justice Blackburn, who tried the cause, left it to the jury to say whether the clerk 288] acted for his own ends and *out of spite in consequence of the dispute, or whether he acted in furtherance, as he supposed, of the interests of his employers to protect their property. The jury found that the clerk was acting in defence of the company's property, and returned a verdict for the plaintiff. The court set this verdict aside and entered a nonsuit. It does not appear whether the clerk when he gave the plaintiff into custody believed or suspected that he had actually taken any money, though the finding of the jury affords an inference that he acted under that belief. The charge however was for the attempt only, and the decision assumed there had been no more than an attempt. The court adopted the principles on which *Edwards v. London and North Western Railway Company* was decided. Mr. Justice Blackburn put two cases, as supposed cases only, and his so putting them shows how little ques-

⁽¹⁾ Law Rep., 2 Q. B., 535.

⁽²⁾ Law Rep., 6 Q. B., 445.

⁽³⁾ Law Rep., 6 Q. B., 65.

tions of this kind have been before the courts. He said he was disposed to think that if a servant in charge of money found another attempting to steal it, and could not prevent him otherwise than by taking him into custody, he might have an implied authority to arrest him, or if he had reason to believe that the money had been actually stolen, and he could get it back by taking the thief into custody, that also might be within the authority of the person in charge of it. The learned judge, however, declined to pronounce a decided opinion on these cases, and held that there was clearly no implied authority to give the plaintiff into custody for an attempt to steal which had failed.

In none of the cases referred to did the question of the authority of a manager or agent intrusted with the general conduct of his master's business arise. They were all cases of particular agencies where the agents had been appointed to a special sphere of duty. The result of the decisions in all these cases is that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge could not be efficiently performed for the benefit of his employer, unless he had the power to apprehend offenders promptly on the spot; though it was suggested that possibly a like authority might be implied in the supposed cases of a servant in charge of his master's property arresting a man who he had reason to believe was attempting to steal, or had actually stolen it. In the latter of these cases it is part of the *supposition that the [289 property might be got back by the arrest, but in such a case the time, place, and opportunity of consulting the employer before acting would be material circumstances to be considered in determining the question of authority.

The liability of the bank in this case must rest either on the ground of some general authority in the acting manager to prosecute on behalf of the bank, or on a particular authority so to act in cases of emergency.

The duties of a bank manager would usually be to conduct banking business on behalf of his employers, and when he is found so acting, what is done by him in the way of ordinary banking transactions may be presumed, until the contrary is shown, to be within the scope of his authority; and his employers would be liable for his mistakes, and, under some circumstances, for his frauds, in the management of such business: *Mackay v. Commercial Bank of New Brunswick* ('). But the arrest, and still less the prosecution of offenders, is not within the ordinary routine of

(') Law Rep., 5 P. C., 394; 9 Eng. R., 202.

banking business, and when the question of a manager's authority in such a case arises, it is essential to inquire carefully into his position and duties. These may, and in practice do, vary considerably. In the case of a chief or general manager, invested with general supervision and power of control, such an authority in certain cases affecting the property of the bank might be presumed from his position to belong to him, at least in the absence of the directors. The same presumption might arise in the instance of a manager conducting the business of a branch bank at a distance from the head office and the board of directors. But whatever may be the case in instances of this kind, their Lordships think that such a presumption cannot properly be made from the evidence given at the trial as to the position held by Mr. Wilkinson. It appears that the board of directors held their meetings at the bank office, and the general manager, Mr. Smith, also sat there; and the clear inference from the evidence (if believed) is that the acting manager was subordinate to the general manager, and that the latter was, as he presumably would be, subject to the superior authority of the directors. Supposing this to be so (and if the facts were disputed, the opinion of the jury should have been taken upon them), their Lordships think it cannot be presumed, from his position alone, that the acting manager had general authority to prosecute on behalf of the bank, and therefore that evidence was required to show that such a power was within the scope of the duties and class of acts he was authorized to perform. The plaintiff offered no evidence whatever on this point; and the testimony of the two managers which has been set out above directly negatives the possession of such a power by the acting manager. Mr. Wilkinson was not cross-examined on this point. Some uncertainty of statement no doubt appears in the cross-examination of the general manager, but according to their Lordships' interpretation of his testimony, his direct evidence as to the absence of general authority in the acting manager is not substantially impaired. The following statements of these witnesses were strongly relied on by the learned counsel for the appellants: Mr. Wilkinson said, "In a case where a man presented a forged check I have as accountant, and should now take proceedings to arrest, where we have to catch the man on the spot, only in such a case. I should do this as acting manager or as assisting manager, accountant, or clerk." The general manager spoke to the same effect: "I will not say that in cases in which the property of the bank is taken and in danger of being lost, unless arrest ordered, action

has not been taken without reference to the board. In such an emergency I should take the responsibility of violating the rule, whether it would be my duty or not." But these statements at the most raise the question whether Wilkinson had authority so to act in cases of emergency, where immediate action is required, and the opportunity of arresting the offender might be lost if reference was made to the general manager or the directors. Granting that these statements afford some proof of such an authority, the further question would arise whether there is evidence that an emergency in fact occurred.

An authority to be exercised only in cases of emergency, and derived from the exigency of the occasion, is evidently a limited one, and before it can arise a state of facts must exist which shows that such exigency is present, or from which it might reasonably be supposed to be present. If a general authority is *proved, it is enough to show, [291] commonly, that the agent was acting in what he did on behalf of his principal. But in the case of such a limited authority as that referred to, the question whether the emergency existed, or might reasonably have been supposed to exist, arises for decision; and that question raises issues beyond the mere facts that the agent acted on behalf of and in the supposed interest of the principal; were it otherwise, the special authority would be equivalent to a general one.

What, then, was the situation when these unwarrantable proceedings took place? The bill had been sent to Allen & Bowden, as notaries, to be presented to the plaintiff for acceptance, and noted if acceptance was refused. It was a trade bill accompanied by shipping documents, which were in the hands of the bank. The plaintiff was a merchant having an office and clerks, one of them known to the notaries' clerk, and it was at his own office the bill was presented to him. According to the plaintiff's evidence, he told the clerk he would accept and send it to the bank. The clerk (Muir) admits he said he would accept it, and thereupon the bill was left with him. Muir seems to have been blamed for leaving it, and Bishop, another clerk, went with Muir to the plaintiff to demand it, and the plaintiff, as Bishop says, put him off on two occasions, and would have nothing to say to him. Some temper appears to have been shown on both sides. Upon Bishop going back to the office, a consultation took place among the clerks of Messrs. Allen & Bowden, and after referring to books, and apparently with the consent of one of the partners, it was determined to lay an information against the plaintiff for stealing the bill. It cannot

possibly be considered that this state of facts raised a case of emergency requiring immediate action by criminal proceedings against a person in the plaintiff's position, or afforded reasonable ground for supposing that such a case had arisen. There was no necessity for immediate action, nor was immediate action in fact taken. The plaintiff was not at once given into custody, but an information was laid before a magistrate, and when he very properly refused a warrant to apprehend him, the summons complained of was taken out when there could evidently be no urgency either 292] to obtain or serve it. It was *obviously an attempt of the notaries and solicitors to recover the bill by means which were thought by them to be more effectual for the purpose than civil proceedings would be.

Their Lordships therefore think, upon facts which appear upon the evidence to be beyond dispute, that there was no necessity or apparent necessity for immediate action, from which authority in the acting manager to instruct the solicitors (if he really did instruct them) to take these proceedings on behalf of the bank could be inferred.

It is to be observed, also, that the bill in question was not under Wilkinson's special charge. He says, "the matter was not in his department. It was a branch business; the general manager takes that."

There being then no evidence of any emergency, the case in their Lordships' view is brought to the issue that the bank would not be liable for the acts of Wilkinson unless it could be established that he had some general authority to institute criminal proceedings. They have already said that they think such an authority cannot be inferred from his position alone as it appears upon the evidence, and that the direction of the learned judge was wrong. The verdict therefore cannot stand.

Their Lordships have lastly to consider whether they should direct a nonsuit or a new trial. The evidence upon which they have assumed the position of the acting manager to be as they have stated it, and the general evidence of the managers upon this part of the case were not, in consequence of the learned judge's direction, considered by the jury. If their Lordships were called upon to put their own interpretation upon the evidence, they would be disposed—assuming it to be true—to hold that it does not afford sufficient grounds for inferring that a general authority to prosecute was within the scope of the acting manager's employment and duties; but they are not competent to judge of the credit due to the witnesses, which is the proper province of the jury; and on

the whole, as the case on this point has not been presented to the jury, they have come to the conclusion that the rule should be made absolute for a new trial.

*In case the action should be again tried, the jury [293 should be told, if the evidence on the point should be to the same effect as on the first trial, that the facts do not present a case of emergency or apparent emergency from which authority could be derived, and consequently that the bank would not be liable for the act in question unless it is proved or can be inferred from the evidence that general authority to prosecute offenders for stealing the bank's property connected with its business at Sydney, without consulting the general manager or the board of directors, was within the scope of Wilkinson's employment and duties, and the powers intrusted to him in relation thereto.

The question whether Wilkinson in fact authorized the solicitors to prosecute the plaintiff will of course be open on the second trial.

In the result their Lordships will humbly advise Her Majesty to reverse the judgment of the Supreme Court discharging the rule, and to direct that the rule be made absolute for a new trial.

The respondent must pay the costs of this appeal.

Solicitors for appellant: *Waltons, Brubb & Walton.*

Solicitor for respondent: *W. H. Gatty Jones.*

See 29 Eng. R., 623 note; *Moak's Underhill on Torts*, 163; 14 Cent. L. J., 401 and cases cited.

An action will lie against a corporation for libel: *McDermott v. Evening Journal*, 43 N. J. Law, 488.

For malicious prosecution: *Boogher v. Life, etc.*, 75 Mo., 319, overruling *Gillet v. Mo. Valley, etc.*, 55 id., 315; *Youngdale v. Keogh, etc.*, 5 Wy., *Webb & A'Beckett, Vict. (Law)*, 197.

So for all wrongs they commit: *Nat. Bank v. Graham*, 100 U. S. R., 702.

An agent of a railroad company, appointed for the purpose of transacting some limited or specified business for the company, cannot bind it outside of its legitimate business, or make contracts for it which the company never authorized any one to make: *Taylor v. Chicago, etc.*, 74 Ills., 86.

The engineer of a railroad has no power, by virtue of his position, to bind the corporation by his contracts. Spe-

cial authority therefor must be shown: *Gardner v. Boston, etc.*, 70 Maine, 181.

A station agent has no implied authority to give in charge a person whom he suspects to be stealing the company's property; and if he gives in charge, on such suspicion, an innocent person, the company is not liable: *Edwards v. London, etc.*, L. R., 5 C. Pl., 445.

The plaintiff, being desirous of going by an excursion train from Monk's Ferry (the defendants' station) to Bangor and back, inquired of the clerk at the former station by what train he could return. The clerk informed him that his ticket would be available by the evening train from Bangor; the plaintiff accordingly obtained an excursion ticket, and returned by the train mentioned by the clerk. On arriving at the platform near to the Chester station, a railway servant who had charge of the train, upon receiving the plaintiff's ticket, told him that he had come

by the wrong train, and that he must pay 2s. 6d. more. This the plaintiff refused to pay, and he was thereupon taken into custody by a railway servant and put under the direction of a superintendent, but, after having been a short time in custody, he paid the money under protest, and was released. It appeared that the Chester station was occupied by the defendants' company and by several other railway companies; but one of the witnesses stated that he believed the person who took the plaintiff into custody to be one of the servants of the defendants' company. The plaintiff's attorney having written to the secretary of the defendants' company for compensation received a written answer from him, requesting that he might be furnished with the date of the transaction, and promising to make the necessary inquiries. The secretary also stated that it was an awkward business, and the blame would fall upon the clerk at the station who had given the false information; and he also offered to repay to the plaintiff the sum of 2s. 6d. he had been compelled to pay: Held, in an action against the defendants for the arrest, that the circumstances of the case did not afford any evidence that the arrest had been made by any authority, either express or implied, given by the company, or that they had ratified the act: *Roe v. The Birkenhead, etc.*, 7 Exch., 36; S. C., 7 Eng. L. and Eq., 546.

The plaintiff came to the R. station of the defendants' railway at a time when a train was expected, and the ticket clerk was engaged in issuing tickets; he entered the ticket office, and asked the ticket clerk for a ticket, but did not then get it. A person outside called the plaintiff out of the office, saying that the train would be gone away; and, as the plaintiff was about to leave the ticket office, the clerk caught hold of him, accused him of having stolen a ticket, searched his pockets, and detained him until the station-master arrived. Upon the representation of the clerk, the station-master had the door of the ticket office locked and the plaintiff searched, when no ticket being found upon him, the station-master discharged him, with an apology for what had occurred.

Upon a motion to set aside the verdict

found for the plaintiff, in an action for assault and false imprisonment, held, per George, J., that there ought to be a new trial, inasmuch as the question, whether the railway officials had authority from the defendants to act as they had done, ought not to have been left to the jury.

Held, per Fitzgerald, J., that there ought to be a new trial, inasmuch as the true question arising upon the evidence, namely, whether the arrest really was for stealing the ticket, and to compel the plaintiff to give it up, had not been left to the jury.

Held, per O'Brien, J., that the verdict for the plaintiff should stand, upon the ground that the only objection made at the trial by the defendants' counsel, namely, that there was no sufficient evidence that the defendants either committed or authorized the trespasses proved, could not be sustained.

Held, by Whiteside, C.J., that the jury having found the fact that the railway officials believed that the plaintiff was attempting to travel without paying his fare, and there being enough to warrant that belief in the officials, the finding ought not to be disturbed: *Van Den Eynde v. Ulster, etc.*, Irish Rep., 5 C. L., 6, affirmed *Id.*, 328.

The fact that a physician in the service of a railroad company is authorized to buy medicines on the credit of the company, does not imply a power to bind the company by a contract for board, lodging, attendance and nursing of a person injured on the company's road: *Mayberry v. Chicago, etc.*, 75 Mo., 492.

No recovery can be had against a railroad company for drugs furnished to a person who has been hurt by the company's locomotive, on the order of a division superintendent of the road, without proof that he was authorized to give the order. The courts cannot take judicial notice of the duties of such an officer: *Brown v. Missouri, etc.*, 67 Mo., 122.

A passenger agent cannot bind his company by a contract to look after freight: *Taylor v. Chicago, etc.*, 74 Ills., 86.

The general manager of a railway company has, as incidental to his employment, authority to bind the company to pay for surgical attendance

bestowed at his request on a servant of the company injured by an accident on their railway: *Walker v. Great Western, L. R., 3 Exch., 228*; *Atlantic, etc., v. Reisner, 18 Kans., 458*; *Atchison, etc., v. Belcher, 24 id., 228*.

See *Marquette, etc., v. Taft, 28 Mich., 289*.

So a general manager of a factory, for a boy injured therein: *Swazey v. Union, etc., 42 Conn., 556*.

Though a station master has not: *Cox v. Midland, 3 Exch., 268*; *Atlantic, etc., v. Reisner, 18 Kans., 458*.

Though slight acts of ratification, as that the superintendent was notified by telegram and did not dissent, will be sufficient to bind the company: *Cairo, etc., v. Mahoney, 82 Ills., 73, 75* and cases cited.

Nor a yard master: *Marquette, etc., v. Taft, 28 Mich., 289*.

To save defendant from a lawsuit plaintiff, at the request of its president and superintendent, paid certain notes held against it, and the president thereupon, in the name of the corporation, made to plaintiff two promissory notes for the amount paid, and the notes were afterwards ratified by the board of directors. Held, that the transaction was

within the scope of the business intrusted by the corporation to its president, as its superintendent and general agent; and held further, that plaintiff having paid money for the use of defendant, at its request, the validity of the original indebtedness could not be inquired into: *Seeley v. San Jose, etc., 59 Cal., 22*.

S. P., Coates v. Donnell, 48 N. Y. Super. Ct. R., 46.

From the mere fact that an agent employed to sell goods, and having in his possession a horse and wagon of his principal, as also the goods offered for sale, puts up at a hotel, the law will not presume a contract by the principal to pay the hotel keeper for the board and lodging of the agent and keeping of the horse: *Sampson v. Singer, etc., 5 S. C., 465*.

The employment of parties to collect the rents of a building, does not give them authority to employ an engineer to take charge of the engine in such building. The employment of such engineer is not within the scope of their authority as agents for the collection of rents, and their contract in that behalf will not bind the principal: *Crozier v. Reins, 4 Bradw., 564*.

[4 Appeal Cases, 294.]

J.C., March 7, 8, 11; May 8, 1879.

[PRIVY COUNCIL.]

***HER MAJESTY'S ATTORNEY-GENERAL FOR THE ISLE [294 OF MAN, *Appellant*; and THOMAS MYLCHREEST and Others, *Respondents*.**

ON APPEAL FROM THE COURT OF EXCHEQUER OF THE ISLE OF MAN.

Isle of Man—Customary Estates of Inheritance—Rights of the Crown—Minerals—Clay and Sand—Acts of Settlement.

The Crown is not entitled to the clay and sand in the customary estates of inheritance in the Isle of Man.

By the laws and customs of the Isle, the owners of customary estates of inheritance in customary tenements of Lord's lands have from time immemorial without the license of Her Majesty or her predecessors, Lords of the Isle, as of right dug, raised, and got the clay and sand therein, and have removed and used the clay for manuring their own and other lands, and for other purposes, and have converted it into bricks and tiles for sale. There is nothing in the history of the title to the Lordship or Manor of Man, and of the customary tenures, from which it is necessarily to be inferred that the above custom could not have had a legal origin; and it may be pre-

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sumed from the existence of the custom, if nothing to the contrary appears, that it grew up with the tenures as one of their customary incidents.

The saving clause in the Act of Settlement does not involve a negation of the custom nor override it: *Held*, that the word "minerals" in that clause did not include clay and sand.

[4 Appeal Cases, 311.]

H.L. (E.), May 1, 1879.

[HOUSE OF LORDS.]

311] *THOMAS HUSSEY, *Appellant*; and JOHN HORNE-PAYNE, and G. M. HORNE-PAYNE, his Wife, *Respondents*.

Contract—Statute of Frauds—"Title to be approved by our Solicitors."

Where a court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration.

Applying this rule, though the first two letters of a correspondence seemed to constitute a complete contract, the House, upon the whole of what had passed in letters and conversation, came to the conclusion that no concluded and complete contract had been established.

Per THE LORD CHANCELLOR: *Quære*, whether the addition, in a written document, of the words "subject to the title being approved by our solicitor," could affect a contract for the sale of land, otherwise complete in itself?

Quære, whether the proper meaning of such words is more than that the title offered is not to be accepted without investigation, and that objections made on such investigation would be subject to the decision of a legal tribunal?

Per LORD SELBORNE: The observation stated in *Jervis v. Berridge* (1), that "the Statute of Frauds is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties," affirmed.

APPEAL against a judgment of the Court of Appeal, reversing an order of Vice-Chancellor Malins, made in an action for specific performance, brought by the appellant against the respondents, in relation to a sale of certain freehold land situated at North End, Fulham.

Mrs. G. M. Horne-Payne was entitled for her separate use to the property in question called the Mornington estate. Negotiations for the purchase of the estate by Mr. Hussey had been going on when Mrs. Horne-Payne wrote the following letter, dated the 4th of October, 1876: "I cannot accept your offer of £35,000 for my freehold land at North 312] End. I refused that sum for it 15 months *ago, when offered by Messrs. Willett through Messrs. Saunders. I am now willing to divide the difference between your offer and my price, and I am prepared to accept £37,500 for the entire freehold property, or £34,000 for the property without the Mornington House and 1½ acre of ground." This letter was

(1) Law Rep., 8 Ch. Ap., at p. 360; 5 Eng. R., 589.

addressed to Mr. Weaver, who was acting on behalf of Mr. Hussey.

On the 6th of October, 1876, Mr. Weaver sent an answer in the following terms: "I beg to acknowledge the receipt of your letter of the 4th instant, stating that you are willing to accept the sum of £37,500 for the whole of your freehold land at North End (including the Mornington House estate), and I hereby, on behalf of Mr. Thomas Hussey, of 96 Kensington High Street, accept your terms as above, and agree to pay you the said sum of £37,500 for your land as aforesaid, extending from Hammersmith Road to the Hammersmith Railway, subject to the title being approved by our solicitors."

It was alleged that there had been a suggestion made by Mrs. Horne-Payne that it would be for the mutual convenience of herself and Mr. Weaver that the purchase-money should be paid by instalments, but at a meeting of Mr. Hussey, Mr. Weaver, and Mr. Gasquet (the solicitor of Mr. Hussey), at the office of Mr. Crowdy (the solicitor of Mrs. Horne-Payne), it was said by Mr. Crowdy that he knew of no agreement to take the money by instalments, and that nothing less than the immediate payment of 10 per cent. of the purchase-money by way of deposit, and the payment of the residue in a few months would be accepted. It was stated that Mr. Hussey had been mistaken on this point, and his solicitors, on the 24th of October, 1876, wrote to Mr. Crowdy that, as he had said he could make no other arrangement for the payment of the purchase-money except 10 per cent. down as a deposit, and the balance in a few months' time, Mr. Hussey had no alternative but to decline the matter, and as soon as Mr. Crowdy's client should be prepared to treat on the footing of payment by instalments extending over about three years, they would be prepared to negotiate again on Mr. Hussey's behalf. Mr. Hussey afterwards saw Mrs. Horne-Payne, and reminded her of the understanding about payment by instalments, and on the 25th of October, 1876, she wrote to Mr. Weaver: "I have this moment seen Mr. Crowdy, *and have given him positive instructions [313 to accept Mr. Hussey's offer of payment by instalments in three years and the deposit down. This is very much against Mr. Crowdy's wishes, but I, after all, am the gainer or loser by it, and I have taken the responsibility."

Mr. Crowdy, on the 31st of October, 1876, wrote to Mr. Gasquet the following letter: "Mornington Park estate. We have had some farther communication with our clients hereon, and are authorized to state to you that they will be

willing to carry out this sale upon the following terms which, we believe, correspond with what your client proposes, videlicet:

"1. A deposit of £10 per cent. to be paid down.

"2. Balance of purchase-money to be paid by three equal instalments from date of contract.

"3. Interest at £5 per cent. on balance unpaid from time to time.

"This we believe is all that relates to the money payments, the other details of the contract we can settle.

"We should add that this only binds our client on acceptance by yours."

On the same day Mrs. Horne-Payne wrote to Mr. Weaver, announcing that Mr. Crowdy had written accepting the terms proposed, of paying 10 per cent. down, and the balance in three years, and expressing a hope that the details might be carried out before the following Saturday.

On the 14th of November, 1876, Mr. Weaver called on Mr. Crowdy and left with him a complete statement of the terms as actually understood between the parties. The paper was headed "Proposal by Mr. Thomas Hussey for the purchase of the freehold property known as the Mornington estate." The instalments named therein were six, the first to fall due on the 25th of December, 1877, and a corresponding part of the estate was to be conveyed on the payment of each instalment. The last sentence of this proposal was "Upon the contract being signed the said Thomas Hussey is to be let into possession of the property." On the 21st of November Mr. Crowdy (who was then very ill) wrote to excuse himself for not having noticed at the time an "obvious mistake" in the paper left, and pointed out [314] that the first instalment instead of being in December, 1877, ought to be in June, 1877, and Mr. Gasquet having afterwards called on Mr. Crowdy, and agreed to the suggested alteration, it was understood (as the statement of claim alleged) that Mr. Crowdy's counsel was at once to prepare the draft of the formal contract. The formal contract never was prepared, and after correspondence between the parties, beginning in March, 1877, this action was, in August, 1877, brought by Mr. Hussey claiming specific performance and damages, and farther relief.

The defendants demurred on the ground that in the statement of claim no subsisting agreement was alleged of which specific performance was claimed, nor was there any memorandum or note in writing of such agreement signed by either of the defendants, within the Statute of Frauds.

Vice Chancellor Malins was of opinion that the offer of the 4th of October was unconditionally accepted by the letter of the 6th of October; that Hussey proposed to abandon it on the 24th of October on account of the difference as to the payment of the purchase-money by instalments, but that the defendants declined to abandon it, and on the 25th of October conceded the payment by instalments; and that the subsequent negotiations between the parties did not constitute any legal abandonment of the contract; he therefore overruled the demurrer. This decision was reversed by the Court of Appeal (¹), the Lords Justices being of opinion that there had not been a completed contract, for that the words "subject to the title being approved by our solicitors," constituted a new term which required acceptance.

Mr. John Pearson, Q.C., and Mr. H. M. R. Pope, for the appellant: The two letters of the 4th and 6th of October, 1876, constituted a contract for the sale of the estate. There had been some previous negotiations which the letter of the 4th of October noticed and adopted; and the letter of the 6th of October was a formal acceptance of the terms stated in that of the 4th. The contract was, therefore, concluded and complete. The addition of the words "subject to the title being approved of by our solicitor" could not [315 affect the matter. They were mere words of form which were understood, if not expressed, in every negotiation and contract for the sale of land. The vendor was always bound to make out a good title, and unless he did so the purchaser was not bound to accept it. The words, therefore, were mere words of course. Yet the court below had treated them as if they formed a precise, specific, and unaccustomed stipulation, and required to be formally assented to, and if not formally assented to, the contract could not be complete. That was not the way in which they were treated in practice. *Hudson v. Buck* (²) did not justify the purpose for which it was cited in the court below. On the contrary, it really treated those words as the necessary accompaniment of any negotiations for the sale of an estate, without complying with which (where there was no *mala fides* or unreasonableness on the part of the purchaser) a sale could not be enforced. No *mala fides* existed here, nor was any unreasonable objection made. *Duddell v. Simpson* (³), *Page v. Robinson* (⁴), and *Price v. Dyer* (⁵) showed that even if there

(¹) 8 Ch. D., 760; 25 Eng. R., 561.

(²) Law Rep., 2 Ch. Ap., 102.

(³) 7 Ch. D., 683; 23 Eng. R., 808.

(⁴) 8 Russ., 114.

(⁵) 17 Ves., 356.

had been some variations of terms after a contract had been really made, the court would still enforce performance of it; and *Gordon v. Mahony* ⁽¹⁾ established that there must be as clear evidence of the waiver of a contract as of the making of it. *Noble v. Ward* ⁽²⁾, affirmed on appeal ⁽³⁾, following *Moore v. Campbell* ⁽⁴⁾, proceeded on that principle. And even as to leases, where a first lease had been granted, and then a second, which recited the surrender and acceptance of surrender of the first, but which turned out to be itself inoperative, it was held that the first remained in force. Where there was a concluded and complete contract it could not be destroyed by anything less formal than itself: *Carolan v. Brabazon* ⁽⁵⁾; Vendors and Purchasers ⁽⁶⁾.

Mr. *H. Fox Bristowe*, Q.C., and Mr. *Benjamin*, Q.C. (Mr. *F. W. Bush* was with them), for the respondents: The authority of the cases cited on the other side may be 316] *admitted, but they are wholly inapplicable here. There never was a concluded and complete contract in this case. That was the real question to be decided here, and it must be decided on a consideration of all the circumstances of the case: *Rossiter v. Miller* ⁽¹⁾. So considered it was clear that there never had been any contract of which performance could be directed.

Mr. *Pearson* replied.

THE LORD CHANCELLOR (Earl Cairns): My Lords, I will not refer, in the first instance, to the grounds upon which this case was decided by the Vice-Chancellor and the Court of Appeal, but I will ask your Lordships to observe what the facts of the case are upon which you have now to form an opinion. My Lords, at the outset I must say that I recognize the great convenience of having a case stated frankly and fairly as this case has been, upon the claim, and thereby enabling the court, without the parties being put to any greater expense, to decide upon the claim, upon a demurrer being put in, whether the plaintiff has a case in respect of which he is entitled to relief.

This is an action for specific performance of a contract. It is a contract for the sale of land, and the plaintiff must show two things: he must show that there is a contract concluded between the parties, and that there is a note, a memorandum in writing, of that contract sufficient to satisfy the

⁽¹⁾ 13 Ir. Eq. Rep., 383.

⁽²⁾ Law Rep., 1 Ex., 117.

⁽³⁾ Law Rep., 2 Ex., 135.

⁽⁴⁾ 10 Ex., 323.

⁽⁵⁾ 3 J. & Lat., 201.

⁽⁶⁾ Chap. iv. s. ix.

⁽⁷⁾ 3 App. Cas., 1124; 24 Eng. R., 684.

requirements of the Statute of Frauds. The second requisite in this case he proposes to supply through the medium of letters which passed between the parties, and it is one of the first principles applicable to a case of the kind that where you have to find your contract, or your note or memorandum of the terms of the contract in letters, you must take into consideration the whole of the correspondence which has passed. You must not at one particular time draw a line and say, "We will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond." In order fairly to estimate what was arranged and agreed, if anything was agreed between the parties, you must look at the whole of that which took place and passed between them.

*The first two letters in this case are dated the 4th [317 and the 6th of October. In the first of them Mrs. Horne-Payne, who appears to have been entitled to freehold property for her separate use, stated that she was willing to "divide the difference" between an offer which had been made to her and the price she had asked, and to accept the sum of £37,500 for the freehold property, mentioning the name of the property. The answer was in these words: [His Lordship read it, see *ante*, p. 312.]

Now I put aside these last words, "subject to the title being approved," for separate observation, and, putting them aside, I should say that if these two letters were the only information which your Lordships had upon the subject—if the matter had ended here as it began, with these letters—I should have been disposed to say that there was undoubtedly evidence of a concluded contract sufficient to satisfy the Statute of Frauds. There is property named, there is a price to be paid, and there is the name of the vendor and of the purchaser. And, of course, stopping there again, the words which I have read would imply that the purchase-money was to be paid in the usual way, namely, as soon as the title to the land could be produced by the vendor and a conveyance offered.

But the case does not stop there, and, we are told, partly by the statements of the plaintiff and partly by farther letters which passed, very much more, which must be imported into the case and must be taken along with the letters which I have read. The first thing we are told by the plaintiff himself is this: that "in the course of the negotiations which resulted in" these "letters, the defendant had suggested that it would be for the mutual convenience of herself and the plaintiff that the purchase money should be paid by in-

stalments, and the plaintiff acquiesced." Now that is alleged to be a statement of a term of the agreement arranged outside what was written, but omitted to be mentioned in what was written. I look upon this more as a statement that it had been agreed between them that there should be a settlement as to the instalments in which the purchase-money was to be paid; that it should be paid by way of instalments, and not in one sum, but that it should be a subject of settlement what were to be the instalments in which the money should be paid.

And that seems also to be the view of the plaintiff, because 318] he *continues, "Pursuant to this suggestion, she, shortly after the receipt of the letter of the 6th of October, 1876, viz., on the 11th of October, 1876, wrote to William Weaver" (the agent of the plaintiff) "requesting him to meet her at the office of Mr. Crowdy, her solicitor, on the following day, 'to discuss the terms of payment, etc.;"' that is to say, to discuss the subject of a payment to be made by way of instalments and not in one gross sum—as I understand it—to arrange the instalments in which the payment was to be made. Then the plaintiff continues: "Accordingly, on the 12th of October, 1876, the plaintiff and his solicitor, Mr. Gasquet, and the said Mr. Weaver, called upon the said Mr. Crowdy. The said defendant, however, failed to keep her appointment, and the said Mr. Crowdy, alleging that he knew of no agreement to take the purchase-money by instalments, stated that nothing less than the immediate payment of £10 per cent. of the purchase-money by way of deposit, and the payment of the residue thereof in a few months would be accepted," that is to say, Crowdy stood upon that which was written in those two letters. Those, said he (this was his view), constitute an agreement upon which we may rely; we hold you to them, and you must pay the purchase-money in one sum, putting aside the deposit, and on the usual terms.

But was that the view of the appellant? Certainly not, because he says, "Meanwhile the plaintiff, on the faith of the understanding that the purchase-money should be paid by instalments, had allowed certain arrangements which he had made for providing the purchase-money at once, to fall through. Shortly after the last-mentioned interview, therefore, in the belief that he had in this respect been unfairly treated by the said defendant, he directed his solicitors to write, and they, on the 24th of October, 1876, wrote to the said Mr. Crowdy, that as he stated that he could make no other arrangement for payment of the purchase-money ex-

cept 10 per cent. down as a deposit, and the balance in a few months' time, Mr. Hussey had no alternative but to decline the matter, and as soon as Mr. Crowdy's client should be prepared to treat upon the footing of payment by instalments extending over about three years, they would be prepared to negotiate again on Mr. Hussey's behalf."

"I can conceive nothing clearer than the result of [319 the statement which the appellant thus makes. There were two letters, no doubt, but, as he says, both I and the vendor were at one that there was to be a payment of the purchase-money by way of instalment; we had not agreed what those instalments should be. I was ready to settle them. Your solicitor repudiated the idea that there were to be instalments, and required immediate payment of the purchase-money. Thereupon I said that that was unfair, and I was not ready to be bound by any claim of that kind, and that I would "decline the matter," which must be taken to mean decline the arrangement for the purchase, and he would be ready to treat, or to "negotiate again" as soon as Mr. Crowdy "should be prepared to treat upon the footing of payment by instalments." Now this is not a matter of controversy upon the demurrer; this is the attitude which the appellant assumed at the time, and it must be taken, as against him, that that was the correct view of the facts of the case at that moment.

How, then, did the case proceed? Weaver, his agent, saw Mrs. Payne, and she wrote to him. He having reminded her of the understanding about the instalments, she at once admitted it, and in her letter said: [His Lordship read the letter.] Now, if this could be taken as a memorandum of that part of the agreement which, up to that time, never had been settled; if this could be taken as the statement of what was wanting, and a memorandum in writing of the manner in which what was wanting was to be supplied, then the *desideratum*, the thing which was omitted in the two original letters, might be taken as supplied. But this, after all, is merely a statement referring the appellant to the solicitor of the respondent, and a statement of what she had desired the solicitors to do. Therefore we must look at what the solicitor did under those instructions.

Now what he did say was this. He wrote to the solicitor for the appellant, "We have had some farther communication with our clients hereon, and are authorized to state to you that they will be willing to carry out this sale upon the following terms." And then he gives three terms with regard to the instalments. "This" (he says) "we believe is

all that relates to the money payments, the other details of 320] the contract we can settle. Let us *hear if you are instructed to the above effect. We should add that this only binds our client on acceptance by yours." Here, again, if this had been then accepted, you would have had this added to what had already been put in writing, and you would have had the agreement completed in the way required to complete it. But was this accepted? On the contrary, a week or thereabouts, a fortnight, I think, passes over. Then the agent of the appellant calls on the solicitor for the respondent, and in place of accepting the terms which had been put in writing, puts in a counter proposal—a counter statement of terms—headed, "Proposal by Mr. Thomas Hussey for the purchase of the freehold property known as the Mornington estate," treating it again as still a matter of proposal. He proposes instalments to be paid in a different way, and to be accompanied with certain provisions for partial conveyance as each instalment was paid. The details are not material. "Mr. Crowdy," he says, "on behalf of the defendant, went carefully through the same, and verbally agreed thereto." But even if that had been so, a verbal agreement is insufficient; there was no writing to bind Mr. Crowdy or his client to it.

But a few days after that Mr. Crowdy writes, and in place of expressing agreement with the paper, he demurs to one or two of the provisions in the counter proposal, and speaks of one serious error, which, in his ill state of health he had omitted to notice. He points out that they would not have the effect which he would desire, and he requires a change in the proposal to be made. There was no completed contract. Crowdy was seized with illness; he afterwards died, and nothing was done in the way of supplying what was wanting.

Now, my Lords, the conclusion I draw from that is this, that we have here the appellant himself telling us that the two original letters, which, if you took them alone without any knowledge supplied to you of the other facts of the case, might lead you to think that they represented and amounted to a complete and concluded agreement, yet really were not a complete and concluded agreement, that there were to be other terms which at that time had not been agreed upon, that efforts were made afterwards to settle those other terms, and that these efforts did not result in a settlement of these other terms. The consequence therefore 321] *of the whole is, that it appears to me not only that there is no note in writing, according to the Statute of

Frauds, of that which was a completed agreement between the parties, but that there was in point of fact no completed agreement between the parties.

My Lords, I said I would refer to the grounds upon which the case was decided in the courts below. The Vice-Chancellor was of opinion that the two letters constituted a completed agreement, and then he looked to see whether there was any rescission of that completed agreement, and he was of opinion that there was not. As to that, I can only say that if I could arrive at the conclusion at which the Vice-Chancellor arrived, that the two original letters constituted a completed agreement, I should be disposed to agree with him and say—at all events I should be unwilling to decide in an opposite sense—that there was no rescission standing upon a memorandum of equal authority with the letters. But from what I have said, your Lordships will understand that I cannot find that there was originally in those two letters a completed agreement.

The Court of Appeal reversed the Vice-Chancellor's decision, and dismissed the action, but upon a different ground. The Court of Appeal held that the second of what I have called the first two letters, introduced in the last words of it a new term by stipulating that the sale was to be subject to the title being approved by the solicitors of the purchaser. The Lords Justices were of opinion that that constituted the solicitors the arbiters of whether the title was a good one or not, and that the vendor had not agreed to that term, making the solicitors of the purchaser the arbiters of that question. I rather infer, from the judgments of the learned judges of the Court of Appeal, that they were disposed to look with doubt upon the question of whether, even without this, there was a completed agreement, or would turn out to be a completed agreement between the parties; but they were of opinion that this difficulty was sufficient to decide the case against the appellant.

My Lords, I have not desired to put the opinion which I have offered to your Lordships upon that ground, and I should doubt very much myself, if it were necessary to decide it, whether the opinion of the Court of Appeal in this respect could be maintained. *I feel great difficulty [322 in thinking that any person could have intended a term of this kind to have that operation, because, as was pointed out in the course of the argument, it virtually would reduce the agreement to that which is illusory. It would make the vendor bound by the agreement but it would leave the purchaser perfectly free. He might appoint any solicitor he

pleased—he might change his solicitor from time to time. There is no *directio personarum*; there is no appointment of an arbitrator in whom both sides might be supposed to have confidence. It would be simply leaving the purchaser, through the medium of his solicitors, at liberty to say from caprice at any moment, we do not like the title, we do not approve of the title, and therefore the agreement goes for nothing. My Lords, I have great difficulty in thinking that any person would agree to a term which would have that operation. But it appears to me very doubtful whether the words have that meaning. I am disposed rather to look upon them, and the case which was cited from Ireland would be authority if authority were needed for that view, I am disposed to look upon the words as meaning nothing more than a guard against its being supposed that the title was to be accepted without investigation, as meaning in fact the title must be investigated and approved of in the usual way, which would be by the solicitor of the purchaser. Of course that would be subject to any objection which the solicitor made being submitted to decision by a proper court, if the objection was not agreed to.

Therefore, my Lords, although I arrive at the conclusion at which the Court of Appeal arrived, I desire to say that I am unable to arrive at that conclusion upon the same grounds, but I think it would be much more satisfactory to look at the case upon the broader ground. I think there was here no concluded agreement between the appellant and the vendor, and therefore I submit to your Lordships and move your Lordships, that this appeal should be dismissed with costs.

LORD SELBORNE: My Lords, I am of the same opinion, and for the same reasons, with my noble and learned friend upon the woolsack.

I cannot agree with what appeared to be suggested by 323] part of *the appellant's argument, that, because two letters were written, by which the conditions required by the Statute of Frauds would have been satisfied, if there were nothing outside those letters to the contrary, therefore there is here such a concluded agreement as a court of equity ought specifically to perform, without regard to what preceded, or what followed. The observation has often been made, that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established,

even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement. I adhere to what I said, when sitting in the Court of Chancery, in the case of *Jervis v. Berridge* (¹), that the Statute of Frauds "is a weapon of defence, not offence," and "does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties;" and I think it especially important to keep that principle in view when, as in the present case, it is attempted to draw a line at one point of a negotiation, conducted partly by correspondence and partly at meetings between the parties, without regard to the sequel of the negotiations, which to my mind plainly shows that terms of the intended agreement, which were of great practical importance, and were so regarded on both sides, then remained unsettled and were still the subject of negotiation between them.

LORD GORDON concurred.

Order appealed against affirmed; and appeal dismissed with costs.

Lord's Journals, 1st May, 1879.

Solicitors for appellant: *Kynaston & Gasquet*.

Solicitors for respondent: *James Crowdy & Son*.

(¹) 8 Ch. Ap., at p. 360; 5 Eng. R., 589.

To comply with the statute of frauds, the written memorandum of a contract of sale of land should be so certain within itself or by reference to other writings referred to, in regard to the parties and subject-matter, that specific performance may be enforced without a resort to parol testimony: *Fulton v. Robinson*, 55 Tex., 401.

A writing is no part of the memorandum required by the statute of frauds, unless it is signed by the party to be charged, or made, by annexation or reference, a part of a writing signed by him: *Brown v. Whipple*, 58 N. H., 229.

The memorandum is insufficient, if it is merely a scintilla of circumstantial evidence tending to show the essentials of the contract. Upon a fair construction, its legal import must

show the essentials, including the contracting parties: *Brown v. Whipple*, 58 N. H., 229.

To take a contract for the sale of more than thirty dollars' worth of goods out of the statute of frauds (R. S. c. 111, § 4), "the note or memorandum thereof" need not contain a recital of the consideration, but that may be proved by parol.

The memorandum need be signed by one only of the parties, but it must mention the other.

The memorandum must contain within itself, or by some reference to other written evidence, the names of vendor and vendee and all the essential terms and conditions of the contract, expressed with such reasonable certainty as may be understood from the memorandum or other written evi-

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Hussey v. Horne-Payne.

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dence referred to, if any, without aid from parol testimony.

When a memorandum containing the names of the vendor and vendee is made, signed and delivered by the vendor to the vendee, and accepted as and for a completed memorandum of the essential terms of a contract, and it is capable of a clear and intelligible exposition, it is conclusive between the parties, and parol evidence is not competent to vary its terms or construction; and if in fact some of the conditions actually made be omitted from it, the party defendant cannot avail himself of them.

Parol evidence identifying the subject-matter of a contract does not destroy the sufficiency of the memorandum: *Williams v. Robinson*, 73 Maine, 186.

Defendant drew up and placed in the hands of Allan, a real estate agent, a memorandum in the following form: "I will sell ten acres of land (including the water lots), as also two and three quarters acres of land belonging to Judge Johnstone, adjoining, for the sum of four hundred and thirty dollars per acre, equal to \$5,482.50 or £1,370 12s. 6d., and on which sum I will allow you a commission of 2 per cent."

The memorandum then specified the terms of sale. Allan entered into a written agreement with plaintiff for the sale of the lands on the terms mentioned. The agreement not being carried out, plaintiff brought suit for specific performance, setting out the two agreements.

Held, 1. That the memorandum handed to Allan was a power to sell on the prescribed terms without restriction as to purchaser, if the terms could be obtained.

2. That plaintiff's right to specific performance rested entirely on the defendant's memorandum; that defendant was no party to the agreement entered into by Allan, and that when the latter brought into the agreement anything that went beyond the memorandum, he exceeded his authority.

3. That the agreement could not be imported into the memorandum, and the latter being of a vague and uncertain character, and not sufficiently describing the lands, specific performance could not be enforced: *Hornsby v. Johnstone*, 3 Nova Scotia Dec., 1.

Under recent legislation, an intent is shown not to relax, but to increase, the rigor of the statute of frauds, by not only requiring the authority of an agent for the sale of land to be in writing, and signed by his principal, but that there shall also be a memorandum of the sale in writing, and signed by the agent.

A letter by an owner of real estate to his son, saying: "I wrote to F. if I could get a fair price I would sell,—might rent if I found a satisfactory tenant," aside from its ambiguity in not referring to any specific property, cannot, by any known rules of construction, be held to confer the slightest authority of F. to sell the writer's property, especially when he afterwards went to F. and arranged verbally for him to fix the price, commission, etc., and will not satisfy the requirements of the statute.

Neither does a subsequent letter by the owner to his son, saying: "If you can see F., say to him, if he cannot get A. up to my figures, to hold him till I return, when I can help the sale, perhaps;" nor his telegram to F. in reply to an inquiry, "Will you accept \$10,000 net? Must know immediately," to "Hold on; will be home to-morrow noon; see my son," confer any sufficient authority in writing, under the statute, to F. to make a sale of the party's property. They show, at most, only that F. was employed to solicit and negotiate for prices, but not to make any binding contract for the sale of the property: *Albertson v. Ashton*, 102 Ills., 50.

The following receipt, "Received of James Henderson three hundred dollars, in part payment of a certain tract of land, being my own head right, lying on Rush Creek, in the cross timbers, this 23 March, 1859. Israel Earles." Held, 1, That it was a sufficient memorandum of a contract for the sale of land, though in the form of a receipt. Under such a receipt the consideration may be proved by parol: *Fulton v. Robinson*, 55 Tex., 401.

The plaintiff, a resident of Syracuse, was a travelling salesman engaged in the business of selling a certain kind of tinware: the defendants manufactured the same kind of ware in Queens county. In January, 1875, the follow-

ing memorandum was signed by one of the defendants :

"Memorandum.

Iron Clad Can Co., January 9, 1875.

The understanding with Mr. Drake is as follows : 2,000 dollars for the first year ; 2,500 dollars for the second year, sure, and provided the increase sales shall warrant it, he is to have \$3,000, 3 year, in proportion to business as above.

Iron Clad Can Co.
H. W. Shepherd."

The plaintiff having entered into and continued in the service of the defendants for two years, and being then discharged, brought this action to recover the amount agreed to be paid for his services in the third year.

Held, that as the memorandum did not show that the plaintiff was to render personal services to the defendants as a salesman, it did not contain the entire agreement between the parties, and was not sufficient to take the case out of the statute of frauds : *Drake v. Seaman*, 27 Hun, 63.

The note or memorandum in writing of a contract of sale, required by the seventeenth section of the statute of frauds to be made and signed by the party to be charged, need not be delivered to the other party : delivery is not essential to its validity.

The place of the signature in the memorandum of sale, required by the seventeenth section of the statute of frauds, is immaterial ; and the name may as well be printed as written. The name in print is a sufficient signing if it be recognized and appropriated as his, by the party.

At the trial of the case the following paper was offered as evidence of the contract of sale, the words preceding "Baltimore, Aug. 27th, 1881," being in print :

Office of

Drury, Ijams & Rankin,
Wholesale and retail grocers, and
dealers in flour, feed and fertilizers,
Cor. Gay and High Streets.

E. T. Drury,
W. H. Ijams, Jr.,
S. M. Rankin, Jr.

Baltimore, Aug. 27th (26th), 1881.

Sold W. H. H. Young & Co., 2,500 cans, say 5,000 doz. C. C. C. tomatoes,

@ \$1.10 per dozen, *cash* ; cans at Phila. Depot, Balto., Md.

5,000 dozen @ \$1.10 c. \$5,500.00.

Held, that the foregoing paper was a sufficient note or memorandum of the bargain, to satisfy the seventeenth section of the statute of frauds.

The following letter, addressed by the defendants to the plaintiff, was also offered in evidence :

Office of

Drury, Ijams & Rankin,
Wholesale and retail grocers, and
dealers in flour, feed and fertilizers,
Cor. Gay and High Streets.

E. T. Drury,
W. H. Ijams, Jr.,
S. M. Rankins, Jr.

Baltimore, Aug. 29th, 1881.

Mess. W. H. H. Young & Co.

Gents. :—We regret to say it is impossible for the Chase's Canning Co. to furnish the 2,500 cases, &c., tomatoes purchased of us on 27th (26th) inst., @ 1.10 per doz. Nor do we think it possible to fill order this season, as the fruit cannot be procured.

Hoping this may be entirely satisfactory, we are, very respectfully,

Drury, Ijams & Rankin.

Held, that if the aforementioned memorandum of sale were insufficient of itself, the foregoing letter, which in its terms refers to the memorandum, would certainly be sufficient, when taken in connection with it, to meet the requirements of the statute of frauds.

In a mercantile transaction, where the terms of a written instrument are technical or equivocal on its face, oral evidence is admissible to explain the commercial usage. *Drury v. Young*, 58 Md., 546.

The corporation of Washington, in December, 1867, passed an ordinance granting authority to defendants to construct a wharf at a point on the river front of the city, in consideration of the payment of an annual rent of \$1,000, for the term of ten years. The ordinance was to take effect on the execution by the grantees of a bond to fulfil the requirements of the ordinance. The grantees gave the bond and entered into possession. In 1878 the District of Columbia brought an action to recover the accrued rent.

Held, that the grantees, by entering

into possession of the premises and accepting the terms of the ordinance, made the latter the written memorandum of the contract, which was of itself sufficient to take the case out of the statute of frauds, although if necessary the court could find an additional memorandum in the execution of the bond under the requirements of the ordinance: *District of Columbia v. Johnson*, 1 Mackey, 51.

The defendant agreed to pay the plaintiff \$300 if he would procure a lease of the premises then occupied by him under lease from one W. and adjoining the defendants, with the privilege of making a doorway between the two houses and assign the lease to him. At the plaintiff's request the defendant wrote him the following letter:

"To Mr. John Blood,

Dear Sir,—In reply to yours of today, I promise to give you \$300, provided you can give me a transfer lease, with privilege to make an opening between your premises and my own.

Cash to be paid on completion of transfer lease. This is as I understand it.

Yours most truly,
T. Eaton."

The plaintiff procured a lease, and tendered an assignment of it to the defendant, who refused to accept it, whereupon the plaintiff sued for the \$300.

Held, reversing the decision of the county court, that the defendant's letter was a sufficient memorandum to satisfy the requirements of the 4th section of the statute of frauds, within which the agreement fell, as being a

contract concerning an interest in land; that the premises were described with sufficient certainty, and the omission to specify the terms of the lease was immaterial, they having been left in the plaintiff's discretion. The plaintiff therefore was held entitled to recover: *Bland v. Eaton*, 6 U. C. App. R., 73.

In an action for the non-delivery of certain groceries sold, one K., being defendants' agent, entered the sale in a book which was not produced, but the plaintiff produced a list of things ordered and their prices; and K. afterwards sent the order in a letter, signed by him, to the defendants, who thereupon wrote the plaintiffs, "K. reports a sale that we cannot approve in full but will accept for," enumerating certain articles. Upon the plaintiffs insisting upon the completion of the order in full, the defendants cancelled it altogether. Held, that the letters were a sufficient memorandum within the 17th section of the statute of frauds. Held, also, the letter from K. to the defendants might be assumed, upon the evidence set out, to state that he had made a sale of the goods to the plaintiffs at the prices named in the list; and that such letter was not produced at the trial, though called for by the notice to produce, the court might, if necessary, presume that it stated anything further which might be necessary for the plaintiffs' case. Held, also, that the effect of the letter from defendants to the plaintiffs was not impaired by the disapproval expressed therein of part of the order: *Ockley v. Masson*, 6 Up. Can. App. R., 108.

[4 Appeal Cases, 324.]

H.L. (E.), Feb. 28; March 3, 4, 6; May 5, 1879.

[HOUSE OF LORDS.]

*THE PRESIDENT AND GOVERNORS OF THE MAGDA- [324]
LEN HOSPITAL, *Appellants*; and ALFRED KNOTTS, R. M.
SHAW, JAMES WATNEY, and Others, *Respondents* (').

Charity Lands—18 Eliz. c. 10—*Lease void or voidable*—*Statute of Limitations*.

An eleemosynary corporation is within the meaning and operation of 18 Eliz. c. 10.

A lease, of land belonging to such a corporation, not in conformity with the provisions of the third section of that statute, is therefore absolutely void.

The governors of Magdalen Hospital (created a corporation, for certain charitable purposes, by the 9 Geo. 3. c. 31) made, in 1783, a lease of certain land of the hospital for ninety-nine years, at the rent of "one peppercorn (if lawfully demanded)." The only covenants, on the part of the lessee, were to indemnify the governors from all taxes, &c., during the term, and to surrender the premises at its end; and, on the part of the governors, for quiet enjoyment. No act had been done until now to avoid the lease, or to interfere with the persons holding the land. In July, 1876, the governors brought an action in chancery to recover possession of the land thus leased:

Held, that the lease was absolutely void within the provisions of the statute 18 Eliz. c. 10. That consequently the right of the governors to re-enter on the land existed from the moment of the execution of the lease, and that right not having been sought to be enforced till now, was barred by the Statute of Limitations, 3 & 4 Wm. 4, c. 27, s. 2.

Per LORD SELBORNE: If any rent, however small, had been reserved and received, it would have created the legal relation of a tenancy from year to year, and the Statute of Limitations could not have run.

Pennington v. Cardale (') commented on.

APPEAL against a decision of the Court of Appeal.

In the year 1758 certain persons agreed to form a charity and establish a hospital for the reception, maintenance, and employment of penitent prostitutes. Lands were bought for this purpose, and exchanges took place for other pieces of land in the parish of St. George-in-the-Fields, in the county of Surrey. In 1768 an act *of Parliament [325 (9 Geo. 3, c. 31) was passed constituting the persons who desired to form the charity into a corporation, with perpetual succession and a common seal, and authorizing them to hold lands in mortmain. On the 4th of December, 1783, one Charles Gilbert demised to the appellants and their successors, &c., a piece of land lying to the north-east of their hospital, for the term of fourteen years from the 25th of March, 1783, at the yearly rent of £5, and on the same 4th of December the then president and governors of Magdalen

(') Reversing 22 Eng. R., 14; affirming 25 Eng. R., 601.

(') 8 H. & N., 656.

Hospital executed to Charles Gilbert a lease of certain of their lands "not included within the site of a wall of the present hospital, or the gardens and yard thereof," for the term of ninety-nine years, at a peppercorn rent. The lands thus demised included those sought to be recovered in this action. The only covenants in this lease entered into by Gilbert, were to indemnify the corporation from all taxes, &c., and to yield up possession at the end of the term. There was a covenant by the lessors for quiet enjoyment. Gilbert entered into possession. He became bankrupt in 1793, and on the 9th of October, 1794, the president and governors demised to his assignees the same premises for a reversionary lease for fifty years, "to commence and be completed from and at the end of the said term of ninety-nine years," to be held also at a peppercorn rent, and subject to the covenants contained in the ninety-nine years' lease. In 1795 Gilbert and his assignees demised to the president and governors of the hospital a piece of leasehold land for fifteen years and a half, also at a peppercorn rent, both demises being recited to be made in pursuance of an agreement to that effect made in 1793. What that agreement was did not appear, nor did any explanation of the granting of these various leases appear capable of being given. The occupiers of the land, the subject of the ninety-nine years' lease, seemed to have changed more than once, and that land was now claimed by persons of the name of Shaw as their freehold property. Knotts was their tenant, in occupation of The Tower public house, situated at the corner of Tower Street and the Westminster Bridge Road, and Mr. Watney was a mortgagee of Knotts' leasehold interest. No claim of rent nor any assertion of title to the property had been made by the appellants for above eighty 326] years, until they issued the writ in the *present proceeding. The appellants, on the 11th of July, 1876, commenced an action in the Chancery Division against Knotts to recover possession of The Tower public house, alleging that under the statute 13 Eliz. c. 10, the ninety-nine years' lease ought to be declared void as an improvident alienation of the lands of the hospital, and they asked to have an account of the rents and profits from the date of the issuing of the writ, and for farther relief. The Shaws and Mr. Watney claimed to defend, and were made defendants accordingly for their respective interests.

All the defendants relied for their defence on the Statute of Limitations and on that ground demurred to the statement of claim.

The demurrer was, on the 11th of December, 1876, argued before the Master of the Rolls who, following what he believed to be a decision binding on him, held that the lease was not originally void but only voidable at the option of the governors of the hospital, that the present governors had, by bringing the action, exercised that option, and avoided the lease; that the Statute of Limitations did not begin to run till action brought, and therefore did not apply to the case (*). The case then went on to trial before Mr. Justice Fry, who followed the ruling of the Master of the Rolls as to the Statute of Limitations, and by his judgment on the 13th of November, 1877, declared that the ninety-nine years' lease was void so far as it affected The Tower public house, and adjudged the plaintiffs to recover possession thereof, and £105 for mesne profits as from the date of the action brought. On appeal it was ordered, on the 16th of April, 1878, that the judgment of the court below should be discharged, and that the action should be dismissed with costs, the Court of Appeal holding that the hospital, although an eleemosynary and not an ecclesiastical corporation, was within the 13 Eliz. c. 10 (*), that the lease

(*) 5 Ch. D., 175; 22 Eng. R., 14.

(*) The title in the Statute Book is: "Fraudulent deeds made by spiritual persons to defeat their successors of remedy for dilapidations shall be void, &c." The recital is: "Where divers and sundry ecclesiastical persons of this realm, being endowed, &c., have suffered the edifices and buildings of their livings to go to ruin and decay, and have made deeds of gift and colorable alienations, &c., to defeat and defraud their successors, be it therefore enacted," &c.

Sect. 3: "And for that long and unreasonable leases made by colleges, deans and chapters, parsons, vicars, and others having spiritual promotions, be the chiefest cause of the dilapidations and the decay of all spiritual livings and hospitality, and the utter impoverishment of all successors, incumbents in the same: Be it enacted, that from henceforth all leases, gifts, grants, feoffments, conveyances, or estates to be made, had, done, or suffered by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, *master or guardian of any hospital*, parson, vicar, or any other having any spiritual or ecclesiastical living, or any houses, lands, tithes, tenements, or other hereditaments, being any parcel of the possessions of any such college,

cathedral, church, chapter, hospital, parsonage, vicarage, or other spiritual promotion, or any ways appertaining or belonging to the same, or any of them, to any person or persons, bodies politic or corporate (other than for the term of one and twenty years, or three lives from the time as any such lease shall be made or granted, whereupon the accustomed yearly rent, or more, shall be reserved and payable yearly during the said term), shall be utterly void and of none effect, to all intents, constructions, and purposes; any law, custom, or usage to the contrary anywise notwithstanding."

The 14 Eliz. c. 14 recites the 13 Eliz. c. 10, and the enactment therein that all leases, &c., made by any of the persons therein mentioned, and among them the "master or guardian of any hospital" for more than "one and twenty years, or three lives, in manner and form as is mentioned in the said act, should be utterly void and of none effect," and then enacts and declares "That these words, *master or guardian of any hospital* mentioned in the said former act, were intended and meant of all hospitals, *maisons Dieu*, bead houses, and other houses ordained for the sustentation or relief of the poor, and so shall be expounded, declared, and taken forever."

327] was voidable *under the 3d section of that statute, and that the right to recover possession of the land accrued to the governors of the hospital, not at the time of action brought, but at the time of the execution of the lease, and that consequently the right of action was now barred by the effect of the Statute of Limitations. The judgment of the court below was, therefore, reversed, and judgment ordered to be entered for the defendants (').

This appeal was then brought (').

Mr. *Cookson*, Q.C., and Mr. *Davey*, Q.C. (Mr. *Decimus Sturges* was with them), for the appellants: The lease here was made by persons at the time competent to make it, and the lessee, under whom, in fact, the respondents 328] *claim, entered into possession in virtue of it. The respondents must therefore be considered in the light of tenants to the appellants, and, being so, they cannot dispute the appellants' title. The lease itself is voidable, but not void, and only voidable, perhaps not at the pleasure of those who made it, but certainly of their successors. Now that their successors have thought fit to declare their intention to avoid it, which they have done by means of this action, the lease is avoided and the appellants are entitled to recover. They alone could avoid it, and by this proceeding they have done so. *Kemp v. Westbrook* ('), *Jones v. Carter* ('), and *The Dean and Chapter of York v. Middleborough* ('), clearly established that to be the principle of the law. In the last-named case the Dean and Chapter of York were the grantees, from the Crown, of a rectory, given them for the maintenance of a grammar school. They made an arrangement by which their lessee, and the lord of the manor in the district where the rectory was situate, were to pay them a perpetual composition in lieu of tithes, and the dean and chapter entered into covenants to carry that arrangement into effect. The arrangement was in actual operation above a century, but at the end of that time, the dean and chapter, having then the rectory in their own hands, refused any longer to receive the composition, and the court held that they were not bound to receive it, but were entitled to the tithes. So in *Moore v. Clench* (') the court treated a lease of this kind as voidable, and incapable of being enforced against the grantors, so soon as they had

(') 8 Ch. D., 709; 25 Eng. R., 601.

(') When this case was called on Lord Hatherley intimated his intention to take no part in the hearing, as he was himself one of the governors of the hospital. His Lordship accordingly withdrew.

(') 1 Ves., 278.

(') 15 M. & W., 718, 724.

(') 2 Y. & J., 196.

(') 1 Ch. D., 447.

expressed their will no longer to be bound by it. *Pennington v. Cardale* (*) expressly declares such leases as this to be not void but voidable, and in *Davenport v. The Queen* (†) that rule of construction was applied to a colonial statute in terms similar to the statute of Elizabeth.

The lease might not have been avoided by the original grantors while the corporation remained the same as at the time of the grant, but it could be avoided when the persons of the corporation were changed. There were many cases of that kind to be found *in Bacon's Abridgment (*). [329 In some of them it was said that the statute was made for the benefit and protection of the successors, and of course such successors might allow the lease to run on, or could avoid it at their pleasure. Till avoided, the persons in possession stood in the relation of tenants, for "the law will refer possession to a rightful rather than to a wrongful title," *Doe d. Batten v. Murless* (†); and the mere non-receipt of rent from them would not constitute a bar to the rights of the landlord, except only so far as to limit the number of years within which overdue rent could be sued for.

Statutes of this kind were remedial statutes, and must not be construed strictly, *Edwards v. Dick* (†), where the 9 Anne, c. 14, was not so construed. That statute declared all bills, &c., given for gaming debts to be absolutely void, but in that case a bill of that sort having got into the hands of a holder for value, he was allowed to recover. The general object of the statute was alone considered; and so it ought to be here.

The lease now in question was good at law, and even under this statute could only be avoided at the will and by the act of the lessors. It was not therefore like the leases in the case of *Magdalen College v. The Attorney-General* (†), for there the leases were utterly void, and the real question was, not only by whom, but against whom, any proceeding was to be taken. The leases being void, the right of entry was perfect, and the statute attached from that time. Here the lease was only voidable at the will of the lessors, which, till now, had never been formally declared. That case, therefore, and those founded on it, were unlike the present, and did not apply.

(*) 3 H. & N., 656.

(†) 3 App. Cas., 115. See also *Smith v. The Queen*, 3 App. Cas., 614; 24 Eng. R., 65; and *Fisher v. Tully*, 3 App. Cas., 627.

(*) Tit. Leases, H.

(†) Per Lord Ellenborough, 6 M. & S., 112.

(*) 4 B. & Ald., 212.

(*) 6 H. L. C., 189.

The Dean and Chapter of Westminster's Case (1), *Co. Litt.* (2), *Hunt v. Singleton* (3), *The Lincoln College Case* (4), *Lyn v. Wyn* (5), *Carter and Claycoles' Case* (6), *Archbold v. Scully* (7), *Doe v. Williams* (8), *Garnett v. Bradley* (9), *Dwar-330* *ris on *Statutes* (10), *Doe v. Burrell* (11), *Rickman v. Garth* (12), and *Hayward v. Abbot of Keinsham* (13), were cited and commented on.

Sir H. M. Jackson, Q.C., and *Mr. Cozens-Hardy*, appeared for Knotts and Watney, and *Mr. C. M. Warming-ton* and *Mr. T. N. Hilbery*, for the Shaws.

Sir H. M. Jackson and *Mr. Warmington* addressed the House: Magdalen Hospital was a charity such as came within the description in the statutes of Elizabeth, and the provisions of the 13 Eliz. c. 10, must therefore be applied to leases granted by the governors of that charity: *The Attorney-General v. Glyn* (14). If they were so applied, the lease of 1783 was plainly not voidable only, but actually void. The words of the statute were express. And the decisions had been in conformity with them: *The Collegiate Church of Southwell v. The Bishop of Lincoln* (15) was a direct authority, and the case there was all the more like the present, for the lease was made, as here, by a corporation aggregate without a head. Nor could this lease be held good under the 9 Geo. 1, c. 31, which incorporated the founders of the charity; for though that act, for the benefit of the hospital, gave the founders ample powers to make exchanges of lands, and declared that all rights of common existing over such lands, when obtained by exchange, should be forever extinguished; it said not one word about granting leases for building or otherwise. And there was little doubt that the real explanation of this lease was (though no documents were now capable of being produced to prove it), that these lands had been given in exchange for others more convenient for the purposes of the hospital, and that in that way the peppercorn rent, and the total absence of subsequent interference on the part of the governors of the hospital, were to be accounted for. So far as now appeared, the long possession of the respondents had been that of persons in whom the

(1) *Carter*, 15.

(2) 45 a.

(3) *Cro. Eliz.*, 564.(4) 3 *Co. Rep.*, 60 a.(5) *Orl. Bridg. Rep.*, 123.(6) *Leon.*, 306.(7) 9 *H. L. C.*, 360.(8) 6 *B. & C.*, 41.(9) 3 *App. Cas.*, 944.(10) *Page* 159.(11) 12 *Q. B.*, 1011 n.(12) *Cro. Jac.*, 173.(13) *Dyer*, 46 b.(14) 12 *Sim.*, 84.(15) 1 *Mod.*, 201; 2 *Mod.*, 56.

freehold was vested, and there was nothing to justify the pretence of title on the part of the appellants.

*If the lease was void, then it was clear that the [331] right to re-enter arose at the moment it was granted, and the provisions of the 3 & 4 Will. 4, c. 27, therefore formed a complete answer to the present claim.

The cases cited for the appellants were commented on, and the following were mentioned in addition: *The Attorney-General v. The Foundling Hospital* (*); *Dumper v. Syms* (*); *Rumball v. Murray* (*); *Morrice v. Antrobus* (*); *Roe d. Berkeley v. Archbishop of York* (*).

THE LORD CHANCELLOR (Earl Cairns): My Lords, the facts of the case out of which this appeal arises are stated by Lord Justice Thesiger, in delivering the judgment of the Court of Appeal, with so much care and accuracy that I do not propose to repeat them, but I will at once approach that which is the main question in the case. Is the claim of the appellants to recover the premises known as the "Tower" public house, in the parish of St. George-the-Martyr, in the county of Surrey, barred by the Statute of Limitations?

I may, in the first place, say that I entertain no doubt that the appellants are a hospital within the meaning of the 14 Eliz. c. 14, and therefore also of the 13 Eliz. c. 10. Independently of the decision in the case of *The Attorney-General v. Glyn* (*) it appears to me to be clear that upon the wording of the 3d section of the later statute an eleemosynary corporation like that of the appellants is distinctly brought within the operation of the enactment. This being so, it is too clear for argument, and indeed it was not disputed, that the lease granted by the charity on the 4th of December, 1783, of the property in question, is a lease which is rendered invalid by the operation of the statute. So far as anything appears upon the face of the lease, it is an alienation of the charity estate for ninety-years, which plainly could not be supported.

The question then arises, was the lease voidable or void? The *Lords Justices in the Court of Appeal, consid- [332] ering themselves bound by authority in this respect, have treated the lease as voidable; but, treating it as voidable, have held that the right to enter and avoid it, accrued to the hospital immediately after the lease was made, and was therefore barred at the end of twenty years under the 2d section of the 3 & 4 Will. 4, c. 27. My Lords, I do not think

(*) 2 Ves. J., 42.

(*) Cro. Eliz., at p. 816; 1 Sm. L. C., 25.

(*) 3 T. R., 299.

(*) Hardr., 325.

(*) 6 East, 86.

(*) 12 Sim., 84, at p. 87.

it necessary to examine the reasoning by which the Court of Appeal arrived at this construction of the Statute of Limitations, or to say how far I should be prepared to concur in it, because I must submit to your Lordships that this lease was, *ab initio*, not merely voidable but void.

The words used by the Legislature in the statute of Elizabeth are precise, and as strong as it is possible to make them. The statute declares that every lease, such as is the one before your Lordships, shall be "utterly void and of none effect to all intents, constructions, and purposes, any law, custom, or usage to the contrary, anyways notwithstanding." The onus lies, as it seems to me, upon those who would cut down or qualify the effect of these words to show some ground, either from the nature of the case, or from authority, for doing so. As to the character of the evil which it is sought by the statute to prevent, it is clear that in the case of an eleemosynary corporation, the whole property of which is devoted to charity, and where the office-bearers and other members of the corporation have no personal interest whatever, the object must be to make the property of the corporation absolutely inalienable, in any way other than by the particular form of lease which is authorized. There is no intention to protect a successor against a predecessor; there is no ground for admitting an intention that individual office-bearers of the corporation granting the lease should be bound, but that their successors should be free either to affirm or to disaffirm it. The intention is to condemn the lease as a wrong and a void thing, even though every member of the corporation should have committed himself to it, and should be anxious to maintain it.

My Lords, these considerations show how inapposite, as applied to these acts of Parliament, is any analogy drawn from the ordinary stipulation between lessor and lessee, that if the lessee breaks certain covenants the lease shall be void. 333] The object in such a *case is to give the lessor an opportunity of terminating the lease if he is disposed to do so, but not to terminate it against his will or against his interest; and to hold that the lease must become void, even against the lessor's will, would enable the lessee to get rid of an onerous lease by wilfully breaking the covenant contained in it.

So also with regard to cases (of which a great many were cited at your Lordships' bar), where a lease, not warranted by the statutes of Elizabeth, is made by an ecclesiastical corporation having a head, and where it has been held, while the same head continues, not indeed that the lease is

voidable, but that it cannot be avoided even if the corporation desires it, but that after the death of the head, the corporation, as constituted under his successor, may enter and avoid the lease, but may, on the other hand, so act as again to stop itself from so doing. A large number of these cases is collected in Bacon's Abridgment, title "Leases." There may be some difficulty in understanding how some of these cases, with regard to ecclesiastical corporations with a head, came originally to be decided as they were; probably they proceed on the principle of a personal estoppel by reason of a personal interest in the head of the corporation; but they appear to me to have no application to the case before your Lordships.

There is, indeed, a case mentioned in Bacon's Abridgment (*) under this title—the case of the Collegiate Church of Southwell, reported in Modern Reports (†) and elsewhere—which has some application to a corporation like the appellants, but it is an authority that the lease would be void and not voidable. It runs thus: "Where there is a chapter that hath no dean, as the chapter of the Collegiate Church of Southwell, their grants or leases made by them contrary to 13 Eliz., c. 10, are void *ab initio* against themselves, and so the leases or grants by any other corporation aggregate who have no head or principal person, for they must be either void *ab initio* or good forever, because they" (that is to say, the corporation) "continue always the same, and one has no superiority or power more than another."

To hold, in opposition to the precise words of the statute, that a lease by a corporation like that of the appellants was only *voidable, would not merely be unmeaning, for [334 to say that a lease is voidable implies a right to affirm, which the corporation would not possess, but it might also inflict serious injury on the corporation. A valuable estate of the corporation might be alienated in utter recklessness or something worse, and when the corporation was put in motion to reclaim it, then, as the grant was valid until avoided, the right to mesne profits would not exist.

The Court of Appeal, as the authority for the view that the lease is voidable only, refers to what is stated as a principle of the decision, and not a mere *obiter dictum*, in *Pennington v. Cardale* (‡). I cannot agree that it was any necessary part of the decision in *Pennington v. Cardale* (‡) that the lease was voidable. The question in that case related to the meaning of an exception of certain premises out

(*) Tit. Lease, H., p. 119, 6th ed.

(†) 1 Mod., 204; 2 Mod., 56.

(‡) 8 H. & N., 656.

of a lease granted by a dean and chapter in 1849. The excepted premises were described as rents reserved in any building leases granted by the dean and chapter, and the court held that these words, upon the whole context, meant leases which *de facto* had been granted by the dean and chapter, whether interests were lawfully created by them or not. The inquiry whether these leases were void or voidable was immaterial. It is true that, in delivering the judgment of the court, Mr. Baron Martin says of a lease granted by the dean and chapter contrary to the statute, "It seems quite clear from the authorities cited upon the argument that this lease was not void, but voidable only." These observations do not appear to me to have been necessary for the decision of the case; and even if they were accurate, they did not relate to the effect of leases or grants by a corporation such as that of the appellants; but they referred to the class of cases relating to ecclesiastical corporations with a head, of which I have already spoken.

My Lords, holding, as I do, that the lease of 1783 was absolutely void, the respondents, or those whom they represent, must be taken to have been in possession of the property from 1783 without any title whatever; and not having paid rent to the appellants, or in any other way entered into the relation of tenants, there is nothing to prevent the full operation of the 2d section of the Statute of Limitations, and the right of the *appellants to recover the land is, in my opinion, effectually barred. I shall therefore move your Lordships that the judgment of the Court of Appeal be affirmed, and the appeal dismissed with costs.

LORD SELBORNE: My Lords, I am of the same opinion, and I only desire to make two observations.

The first is, that the explanation of the doctrine laid down in the authorities as to leases by deans and chapters, and by colleges in the universities, is probably to be found in the fact that they were corporations coming within the original restraining act of Queen Elizabeth, the governing members of which received the rents reserved on their leases for their own benefit; and that the succession in them, of one head having a principal share in that beneficial interest, after another, was thought (though by a process of reasoning which I cannot think accurate) to justify the courts in holding that the declared policy of that statute was satisfied so long as those particular successors were protected. That, however, cannot apply to a corporation under the government of persons of whom none has a beneficial interest; and

the *Southwell Case* ⁽¹⁾ is, *a fortiori*, an authority for not extending that doctrine to such a corporation.

The other observation which I wish to make is, that the present case is one for which there was, probably, never any precedent, and which is never likely to be followed by another similar to it—a long term having been attempted to be granted by a charitable corporation at a peppercorn rent. If any rent had been reserved and received, however small, the legal relation of a tenancy from year to year would have been created, and the Statute of Limitations could not have run.

LORD GORDON: My Lords, I concur in the judgment proposed.

I am of opinion that the provisions of the statute of Elizabeth apply to the Magdalen Hospital and to the lease in question. *And that being so, I can entertain no [336 doubt that the lease is not only voidable, but that it was from the beginning void. The terms of the act are, I think, so express as to leave no room for any other construction.

If the lease was *ab initio* void, it follows that the respondents and their predecessors have been all along in possession of the property without any title; and as they have not paid rent to the appellants, or in any other way entered into the relation of tenants, I think that the 2d section of the Statute of Limitations applies, and that all rights on the part of the appellants are effectually barred.

I think, therefore, that the result arrived at by the Court of Appeal (though on different grounds) is right, and that the judgment should be affirmed.

Decree appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 5th May, 1879.

Solicitors for appellants: *Wordsworth, Blake & Co.*

Solicitors for respondents: *Pownall, Son & Co.; Curtis & Betts.*

⁽¹⁾ 1 Mod., 204; 2 Mod., 56.

See N. Y. Code Civ. Proc., § 373.

[4 Appeal Cases, 337.]

H.L. (Sc.), April 7, 1879.

[HOUSE OF LORDS.]

337] *MUIR and Others, Trustees, Appellants; CITY OF GLASGOW BANK and Liquidators, Respondents.*Joint Stock Banking Company—Winding-up—Personal Liability of Trustees—Construction of Contract—Companies Act, 1862 (25 & 26 Vict. c. 89).*

A. and B., trustees for C. and D., accepted, as part of a trust estate, stock in a Scotch banking company. By the deed of copartnership, there was to be no limit whatever to the shareholders' liability. They signed the deed of transfer "as trust disponees," and accepted the stock "as trust disponees foresaid, subject to the articles and regulations of the said company in the same manner as if they had subscribed the contract of copartnership." Their names and addresses were entered in the stock ledger (the register of shareholders), followed by the words "as trust disponees" for C. and D. The individual names of A. and B. did not appear in any list of shareholders issued to the public.

The bank suspended payment with immense liability. The liquidators placed A. and B. on the first part of their list of contributories as liable to calls "in their own right." In a petition to rectify the list of contributories, by transferring the names of A. and B. from the first part to that part entitled "second part—contributories as being representatives of others":

Held, affirming the decision of the court below, that the trustees, A. and B., were partners of the company, and as such were personally liable for payment of all calls made on them in respect of the said stock.

Held, also, that a distinction between partners, with limited and unlimited liability, was repugnant to the whole nature of the deed of partnership.

Lumsden v. Buchanan (4 Macq., 950; Court Sess. Cas., 3d Series, vol. ii, p. 723,) undistinguishable.

Per LORD CAIRNS, L.C.: The words "as trust disponees" were added to the names of the trustees to mark the stock as property of the particular trust; to show that the stock was held on a joint account with a right of survivorship; and possibly with a third purpose—to give a peculiar facility under the law of Scotland to a trustee to retire from the trust.

Per LORD PENZANCE: Where trustees join in a contract of partnership for trading purposes, the mere designation of them as trustees will not exempt them from the same personal liability as is undertaken by the other shareholders.

Per LORD BLACKBURN: Trustees, not created by a statute, are not by the law of Scotland a body corporate or a *quasi* corporation.

THIS was an appeal from a judgment of the First Division of the Court of Session. It raised the important question **338]** whether *the appellants, William Muir, William Thomson, John Boyd, and J. L. Boyd, trustees, who had accepted a transfer "as trust disponees" of certain shares in the City of Glasgow Bank, an unlimited company, were personally liable to pay out of their private property all calls made in respect of those shares, or whether they were only liable to the extent of the trust funds.

The City of Glasgow Bank was a joint stock partnership, created in 1839. In 1862 it was registered as an "unlimited

company" under the Companies Act (25 & 26 Vict. c. 89) of that year; the partnership contract being registered as the articles of the company.

Mr. John Murdock, of Edinburgh, died in June, 1873, possessed of £5,000 of this bank stock, and leaving a trust disposition and settlement executed in 1843. His whole estate was valued at £70,415 5s. 3d.

A question having arisen whether the bank stock would pass under the trust disposition, his two daughters, Mrs. Syme and Mrs. Boyd, the beneficiaries under the deed, made out a title to his estates as executrices-dative *quâ* next of kin, and the confirmation in their favor having been produced to the bank, the £5,000 stock was transferred to their names in the stock ledger.

About the same time Mrs. Syme and Mrs. Boyd purchased £1,000 of new stock issued by the bank, and this being entered in the same account in the stock ledger as the £5,000, they appeared on the register for a total of £6,000 stock. On the 20th of September, 1873, Mrs. Syme, who was a widow, and Mrs. Boyd, with the consent of her husband John Boyd, executed a trust disposition by which they assigned, conveyed, and made over to and in favor of the appellants and the acceptors, or acceptor, survivors or survivor of them, or to such other person as might be assumed into the trust, a majority being a quorum, and to their lawful successors in office as trustees and trustee, for the ends, uses, and purposes contained in the trust disposition and settlement executed by their father, all the real and personal estate to which they had right as next of kin and executrices-dative of their father, the late John Murdock. The trustees had also, *inter alia*, full power to hold or sell such stocks as they might see fit. The appellants were the survivors of those appointed trustees by Mr. John Murdock's settlement of 1843.

*On the 27th of January, 1874, a transfer of the [339 £6,000 stock was executed by Mrs. Syme and Mrs. Boyd, with the special advice and consent of her husband, to the appellants, in order that their legal title to the stock might be completed. The transfer assigned, transferred, and made over to William Muir and his three co-trustees (naming them) "the trust disponees in a deed of conveyance in trust granted by us in favor of the said William Muir, &c., dated and ratified the 20th day of September, and recorded in the books of council and session the 28th day of October, both in the year 1873, and their successors and assigns whomsoever, £6,000 sterling of the consolidated capital stock of

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the City of Glasgow Bank Company, with the whole interests, profits, and dividends that may arise and become due thereon, the said William Muir (and three others named), as trust disponees foresaid by acceptance hereof, being, in terms of the contract of copartnership of said bank, subject to all the articles and regulations of the said company, in the same manner as if they had subscribed the said contract: And we, the said William Muir (and three others named), as trust disponees foresaid, do hereby accept of the said transfer on the terms and conditions above mentioned; and we consent to the registration hereof and of said contract for preservation and execution," &c., signed Mary Syme, Sophia M. D. Boyd, John Boyd, William Muir, William Thomson, John Boyd, J. L. Boyd.

The ordinary transfer form of the City Bank stock ran, "Hereby sell, assign, transfer, and make over to and in favor of the said , heirs, executors, successors whomsoever," &c.

The draft transfer was submitted to the directors, passed by them, and the above transfer identical with the draft was prepared by an officer of the bank, and having been executed by the parties was sent back to the bank for registration. The £6,000 was then transferred to the appellants as trust disponees; an entry being made in the stock ledger (the alleged register of members of the bank) giving the names and addresses of the appellants followed by the words "as trust disponees of Mrs. Mary Murdock, or Syme, 14 Great King Street, Edinburgh, and Mrs. Sophia Maria Darby Murdock, or Boyd, wife of the said John Boyd, trust disponees of Mrs. Mary Murdock, or Syme, and another." 340] *A stock certificate was also issued by the bank to the appellants in these words:

Glasgow, 4th February, 1874.

These certify that the trust disponees of Mrs. Mary Murdock, or Syme, widow of the late Francis Darby Syme, and residing at 14 Great King Street, Edinburgh, and Mrs. Sophia Maria Darby Murdock, or Boyd, wife of John Boyd, residing at 27 Melville Street, Edinburgh, have been entered in the books of this company as the holders of six thousand pounds consolidated stock.

And the back of the certificate was indorsed thus:

William Muir, Esquire, of Inistrynich, Argyleshire, merchant in Leith; William Thomson, Esquire, of West Binny, Linlithgowshire; John Boyd, Esquire, residing at No. 27 Melville Street, Edinburgh; and James Laurence Boyd,

Esquire, Solicitor, Supreme Courts of Scotland, and residing at No. 1 Regent Terrace, Edinburgh, as trust disponees within mentioned.

On the 27th of January, 1874, a mandate was granted by the appellants authorizing the dividend warrants to be made payable to John Boyd, one of themselves. These warrants were made out as for dividends due on "£6,000 consolidated stock standing in the name of the trust disponees of" Mrs. Syme and Mrs. Boyd. Neither in the statutory returns made to the Inland Revenue, nor in the annual returns to the Registrar of Joint Stock Companies, nor in any of the published lists of shareholders, did the individual names of any of the appellants appear; the stock was simply described as being held by the trust disponees of Mrs. Syme and Mrs. Boyd.

The material clauses of the City of Glasgow Bank contract of copartnership are as follows :

Clause (4.) The parties do hereby bind themselves respectively to contribute and pay, when required, the sums of money corresponding to the number of shares of the said stock subscribed by them, as the same are specified in the testing clause of these presents, and are likewise *in maiorem evidentiam*, adjoined to their signatures, and which several sums of money are held to be herein repeated.

(5.) The said partners shall have right to the profits and be liable for the losses, and bound to relieve each other, of all the debts and engagements of the company, in the proportion of their respective interests or shares in the said capital stock.

(6.) Any person holding a share of the said capital stock, whether as an assumed subscriber, or as a purchaser, heir, or other representative of such subscriber, shall be entitled to all the rights and subject to all the liabilities of an original partner of the said company.

(13.) . . . "And that in every case when companies and partners hold part of *the capital stock of this com- [341] pany, only one of the partners of such company shall be entitled to vote and act, and his name shall be entered in the books of this company accordingly; and no person holding shares *pro indiviso* with another, nor any factor or trustee on the bankrupt estate of a partner, nor any trustee, tutor, curator or factor for a partner, shall be entitled to attend any meeting of the company.

(14.) Declaring that no trustee or assignee of any bankrupt partner, or the tutor, or curator, or other guardian, or trustee of any pupil, minor, or incapacitated partner, shall

be entitled to vote by proxy: That no factor, trustee, commissioner, tutor, guardian, agent, or other person, not a partner, shall be entitled to attend any meeting, or to interfere with the affairs of the company . . . Declaring further, that whenever any shares shall be vested in two or more persons jointly, or in a company, or corporation, the votes in respect of such shares must be given by the person whose name stands first in the said book called the "Stock Ledger," so that in no case more than one person shall vote for or represent such persons holding shares jointly, or such companies or corporations . . .

By sects. 21 and 22, ordinary directors might manage the business of the company. And clause 31 gave the directors power to allot shares. The company having power by clause 32 to purchase their own stock.

(33.) The foresaid capital stock, and profits accruing thereon, shall be transferable by the partners respectively, and shall transmit and descend as personal property to their executors, or representatives, by testament . . . Declaring that every partner who shall dispose of his share of the company's stock, agreeable to the regulations hereinbefore and after written, or who shall cease to have an interest in the concern through forfeiture, or otherwise, in terms hereof, shall be entitled to relief of the whole debts owing by the company, and of all obligations granted for the same, and in general of every prestation incumbent on him as a partner of the company, and the other partners shall be hereby bound to relieve him, his heirs and successors, of the same; but such partner shall be entitled to gain no other relief than that contained in this obligation. And the party or parties acquiring shares so disposed, or otherwise coming in right of the party or parties so ceasing to have interest, shall have no claim whatever against the other partners of the company, whether prior or posterior to the period of such party or parties becoming purchasers; but he shall take and assume the place and liability of his author, ancestor, or other cedent, and become subject to all the obligations incumbent upon him.

Clause 34 provided that any gratuitous assignment of stock should be effectual if sanctioned by the directors, but if they saw cause to withhold their sanction from such transfer, they could order such stock to be sold in manner provided in the case of partners becoming bankrupt. Also no sale or transference *inter vivos* for an onerous consideration

was to be effectual until the name of the purchaser and the price accepted was sent in to the *directors; they hav- [342 ing three days to decide whether they would purchase the stock for the company itself or not. Clause 35 enacted that if any partner became bankrupt, he should cease to exercise the right of a partner, the directors having the right to insist on his stock being sold, or else to retain them for the company, accounting to the bankrupt partner for the proceeds or value.

(36.) And also in case a partner deceasing, although no diligence had been or should be used against his estate, and of no party choosing to represent such deceased partner by confirming executor, or otherwise assuming his estate within twelve calendar months after his decease, it shall be in the power of the said ordinary directors of the company, either to sell and dispose of the shares so arrested, attached, or not taken up by a legal title, on the lapse of the said respective periods of twenty days and twelve months, or to retain and appropriate the same to the use of the company.

(37.) Where the shares of any partner are transferred, conveyed, or sold, in terms of the above articles, and that either by the partners or directors, the deed of transference thereof shall be prepared by such person as the ordinary directors may appoint at the head office in Glasgow, in such form and terms as the said directors may from time to time appoint.

(38.) The said deed of transference, as also every assignment of shares in security, or *mortis causa*, and confirmations thereof by right of succession, shall, after being completed, be recorded in a book to be kept for that purpose, and such deeds, transference, assignments, and confirmations, shall be delivered or returned to those in right of the same, after having marked thereon a certificate of the registration thereof; and it is hereby declared that the production of such writings to the said manager or ordinary directors for the purpose of registration, shall, *ipso facto*, infer the acceptance of the capital stock therein specified, and the liabilities of the parties having right to the same as partners of the company, but it is hereby declared that no purchaser or other assignee of, or successor to, shares so acquired shall be recognized as a partner until the writing constituting his title is recorded in the books of the company in manner above specified; . . . it being, however, always understood that the assignee, or heir, or executor to such selling, assigning, or deceasing partner, shall take the pre-

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cise place of his author or ancestor, and shall have no claim on the other partners for relief from debts contracted or obligations entered into, previous to his becoming a partner.

(39.) The name, designation, and place of abode of every partner, together with the number of shares held by him, or her, shall, from time to time, be entered in a book to be kept for that purpose, to be called the "stock ledger," and every partner who shall at any time change his name or place of abode, or being a female, shall marry, and the trustee or assignees of any partner who shall become bankrupt, and the representatives of any partner deceasing, shall, immediately after the occurrence of such events, leave a written notice at the place of business of the company in Glasgow, stating his or her name and place of abode; and when a female partner shall have been married, the name and place of the abode of her husband; and when the name of such partner, with the number of shares held by him or her of the capital stock, shall be so made in said stock ledger, and signed by the officer of the company duly authorized so to do, coupled *with an entry in the stock ledger, of the partner having paid the first call or instalment subscribed for by him or her, such entries shall be held as conclusive evidence of the partnership to the extent subscribed for and appearing by said entries: but, in case further evidence is required, the directors shall cause a certificate, signed by the manager, to be delivered to such partner as shall require the same, specifying the shares to which he or she is entitled in the capital stock of the company, but that always on such partner requiring said certificate, at one and the same time paying any fee or other charge exigible therefor, and which certificate shall be in the following terms:

" CERTIFICATE.

" These certify that
company as a holder of
" Entered,

" City of Glasgow Bank,
" Glasgow, 18
has, of this date, been entered in the books of this
shares.

" Manager."

And upon the shares or part of them, referred to in such certificate, being sold, the said certificate shall be given up to be cancelled, and a new certificate shall be issued to the new partner, if desired, and if any shares included in the certificate given up be retained by the old partner, a new certificate in respect thereof shall, if desired, be issued.

(40.) The person or persons, companies or corporations, whose names shall at any time stand in the said stock ledger

containing the list of partners of the company, whether as original or assumed partners, shall be deemed and taken to be the proprietors of the several shares standing in the said ledger in their respective names, and shall be liable to the payment of every call or calls for instalments of capital stock to be made thereon, and to all actions, suits, obligations, forfeitures, and penalties, and shall be entitled to the whole profits, and liable for all the losses to which the original proprietors of shares in the company are subject, liable, and entitled to by these presents, and the names entered in the said stock ledger, and the amount of shares annexed thereto shall be the sole evidence receivable at any meeting of the partners as to the right of voting at said meeting.

(43.) The ordinary directors of the company shall have full power, and they are hereby empowered, to purchase for behoof of the company, any of the shares of the capital stock which may be offered for sale, either privately or by public roup, whether in virtue of the provisions contained in these presents, or otherwise, and that at such price and prices as they shall consider of advantage to the company. . . .

(46.) . . . If it shall at any time appear, on balancing the company's books, that a sum equal to the whole of the reserved surplus fund, and also to one-fourth part of the paid-up capital stock of the company, has been lost in the prosecution of the business of the company, a special general meeting of the shareholders shall be called by the manager, under authority of the ordinary directors, and the company shall thereupon be dissolved, unless a majority of two-thirds in value of the shareholders, personally or by proxy, present at such meeting, shall determine otherwise, and pay up to such partners as may be disposed to retire, within one calendar month from the date of said meeting, such value for their shares as shall be agreed upon, not exceeding the value as appearing from the last previous *balance of the company's books; declaring, that in [344 such case, the responsibility of the retiring partners shall wholly cease and determine; and declaring that in no other event, and in no other manner shall the company be dissolved, except with the consent and approbation of at least two-thirds of the whole ordinary directors for the time being, given at a special meeting, and also with the consent and approbation of partners holding collectively at least two-thirds of the whole capital stock of the company.

(54 and last.) . . . The parties hereto, and their heirs and successors, shall be bound and obliged to observe and per-

form their respective parts of the present contract, and to abide by and implement the regulations and by-laws of the company in force for the time, in the whole clauses and articles thereof, in good faith, and according to the true intent and meaning of the same.

The City of Glasgow Bank suspended payment with immense liabilities on the 2d of October, 1878, and a resolution to wind up voluntarily was passed on the 22d of the same month of October. The liquidators made up a list of contributories of the bank on the 7th of next November, and on the 13th they made a first call of £500 on each £100 stock. The liquidators entered the appellants in the first part of their list as contributories "in their own right" in respect of the £6,000 stock. The intent of this was to make the appellants personally answerable for calls to the full extent of their private means. The appellants thereupon petitioned the First Division of the Court of Session for alteration of the list by transferring the appellants' names to the second part entitled, "second part, contributories as being representatives of others," with the object of having their liability limited and defined as only an obligation to make the trust estate forthcoming.

The appellants averred *inter alia* in their petition that they never agreed to become individually members or partners of the said City of Glasgow Bank. They only accepted the transfer in their representative capacity as administrators of the trust estate. Their instructions to the officers of the bank were to prepare a transfer in their favor in that capacity, and the transfer so prepared and passed by the directors bears to be in favor of them as trustees, and their successors and assigns whomsoever, and the obligation therein contained bears to be undertaken by the petitioners as trust disponees. The entry in the stock ledger is qualified in the same terms.

It was the regular practice of the City of Glasgow Bank, in virtue of the permission implied in sect. 30 of the act 25 & 26 Vict. c. 89, to recognize trustees in their trust capacity, and to insert their names in the said register of shareholders expressly as trustees. Trustees were by the company's contract debarred from attending meetings of the company.

The company of the City of Glasgow Bank, by their assent given to the said transfer in manner aforesaid, and by the 345] entry in the stock ledger or register of *shareholders, entered into a special contract with the principal petitioners

to admit them as holders of stock in their representative capacity as trust disponees, under the deed of Mrs. Syme and Mrs. Boyd, or administrators of the trust estate thereby conveyed, and by the terms of their obligation the petitioners undertook only to subscribe to the undertaking, and to be liable in the obligation incumbent on holders of stock, to the extent of the trust funds under their administration. They are, therefore, only liable to be placed on the list of contributories in part second thereof, as contributories in a representative capacity.

The respondents answered:—The liquidators had no knowledge of the amount of the value of the trust estate, and deny that it is the measure of the petitioners' liability. Denied that the petitioners only became liable "in their representative capacity as administrators of the trust estate," or that the directors of the bank entered into a special contract with them whereby their liability was in any way limited. Neither the bank nor its directors had any power or authority to enter into any such contract, and they never did so.

The dividends that became due upon the £8,000 stock were paid to the petitioners or their agent, with their authority. The petitioners are partners of the bank, and are contributories liable in their own right.

A minute of admission was arranged by the parties, which contained the above facts.

The Court of Session on the 20th of December, 1878, unanimously held that the decision of the House of Lords in *Lumsden v. Buchanan* (1) governed this case; and that therefore the appellants were personally liable to pay all calls made in respect of the shares they held (2).

From this decision the trustees appealed.

Mr. *Napier Higging*, Q.C., and Mr. *John M'Laren* (of the Scotch bar) for the appellants, contended that they had never agreed to become, individually and personally, members of this company; the contract they had with the bank was to hold themselves liable only to the extent of making the trust estate forthcoming, and accordingly they were accepted, and registered by the company as holders of stock merely "as trust disponees."

The contract with the bank was of a qualifying character, governed by the peculiar law of Scotland, under which

(1) 4 Macq., 950; Court Sess. Cas., 3d Series, vol. ii, p. 695; and vol. iii (H.L.), p. 392; Scot. Law Rep., vol. xvi, p. 147. p. 89.

(2) Court Sess. Cas., 4th Series, vol. vi, p. 392; Scot. Law Rep., vol. xvi, p. 147.

obligations undertaken by trustees in their representative capacity did not imply individual responsibility.

The respondents contended that such a contract was *ultra* 346] *vires* of the bank's contract of copartnership. Then, if that was the case, the appellants, never having become members of the company, the transfer was ineffectual, and the whole transaction was a nullity, having no force or effect, leaving the trust estate of the transferors solely liable, their names still remaining on the register.

Regarding the facts of both cases, neither the decision in *Lumsden v. Buchanan* (1), nor the principle there involved, governed this case. In that case eight of the Court of Session judges against four held that Buchanan and others, who were on the register of the Western Bank as trustees, were not personally liable for calls; on appeal this decision was reversed by Lord Westbury, L.C., Lord Cranworth, and Lord Kingsdown.

There was a wide distinction between the law of Scotland and that of England governing the position, functions, and office of trustees; and on the construction of contracts made by trustees, see opinions of Lord Barcaple (2), Lord Curriehill (3), and Lord Bentholme (4), in *Lumsden v. Buchanan*. These opinions of the law were not displaced in any way by the reversal of that case by the House of Lords. Lord Deas, in the present case, also gave a very strong opinion on this point (5). See also the opinions of Lord Westbury (6), Lord Kingsdown (7), and Lord Moncreiff (the Lord Ordinary), in *Gordon v. Campbell* (8).

The Legislature had refused to extend to Scotland what it enacted in England and Ireland—that there should be no notice of trusts on the list of partners of banking companies. The Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), contained, in the 19th section, the provision that “no notice of any trust, express or implied or constructive, shall be entered on the register or receivable by the company.” This act, though it applied to Scotland, did not include banking companies (sect. 2), but by 20 & 21 Vict. c. 49, s. 3, it was extended to banking companies; but sect. 15 specially provided that sect. 19 of the act of 1856 should not 347] *apply to any banking company in Scotland. Then followed the Companies Act of 1862, under which the City

(1) 4 Macq., 950.

(2) Court Sess. Cas., 3d Series, vol. ii, p. 723.

(3) Ibid, p. 738.

(4) Ibid, p. 718.

(5) Court Sess. Cas., 4th Series, vol. vi,

p. 405; Scottish Law Rep., vol. xvi, p. 150.

(6) 4 Macq., 955.

(7) Ibid, 968.

(8) Court Sess. Cas., 2d Series, vol. ii,

p. 643, The Lord Ordinary's Note.

of Glasgow Bank was incorporated. Sect. 30 also excluded the application of the rule to Scotland, therefore trustees have always been receivable in their fiduciary character. The appellants' case was that, by the law of Scotland, a body of trustees is recognized as representing a proprietary interest distinct from that of the individuals comprising it, that trustees as a body can enter into contracts in that capacity without pledging their individual credit and responsibility, and that, where the contract is entered into with the trustees in their representative capacity, the law will not support the other contracting party in a claim in which the special character or qualification of the contract is ignored, and the trustees are treated as individually responsible to him: Bell's Comm. ('). It was the inveterate practice in Scotland, wherever trustees had occasion to enter into contracts for the benefit of the trust estate, to qualify the conveyance or obligation with the words "as trustee," or words of equivalent import, which were understood in Scotch practice to qualify the obligation, so that the estate which the trustees represented should be only liable. And where trustees sold any portion of trust property they were bound to grant warrandice of the right they conveyed: *Forbe's Trustees v. M'Intosh* ('); Prof. Menzie's Lectures.

Again, as to the difference of the law; in Scotland a gratuitous trustee had a statutory right to resign his trusteeship, 24 & 25 Vict. c. 84, s. 1, and 30 & 31 Vict. c. 97, s. 10; they also had the rights of a quorum. But in England, he could not withdraw, except by the consent of all the beneficiaries, or by virtue of some provision in the deed, or by an order from some competent court; also every trustee in the absence of some special provision was bound to agree in every act of the other trustees.

[EARL CAIRNS: In certain cases, such as *Gordon v. Campbell* ('), the contract might be "we as trustees agree to do so and so," well, the meaning of that was not a question of Scotch or English law, but simply a question of construction. Do you produce any authority as to any peculiarity of the law of Scotland on *this point except such instances as *Gordon v. Campbell*? which was, as it appears to me, an instance only of the construction of particular words.]

None of the authorities are so clear as *Gordon v. Campbell* ('), but the law as to trustees undertaking as trustees

(') Vol. i, pp. 80, 81, 88, 89.

(') Court Sess. Cas., 2d Series, vol. ii,

(') June 15, 1822; 1 S., 497; 2d ed., p. 643.

was so well understood in Scotland, that no authority was needed. For generations the people of Scotland had entered into the situation of trustees and had thus contracted, believing that they were not personally liable. A great and immense difference in *Lumsden v. Buchanan* (1) was, that there the trustees were original allottees, and appear to have been bound to take the stock before they executed the deed at all; they executed the deed as individual partners might; appending afterwards in the testing clause for collateral purposes that they were trustees; but here the appellants executed the transfer, in the most explicit way, "as trust disponees," over and over again in the body of the deed and in terms corresponding to *Gordon v. Campbell*. There was no real difference between the words "*quā* trustees only," and "as trust disponees;" in fact the decision in *Gordon v. Campbell* governed this.

[EARL CAIRNS: You say that the trustees stipulated to make themselves liable only to the extent say of £5,000, the amount of the stock, the amount of the trust estate, could such a thing have been done, this being a bank of issue with unlimited liability?]

Yes, by the law of Scotland, and the bank could accept them, the real intention of the transfer was nothing more than this, that the trustees should be put on the books in respect of stock as to which the company and the public had already members, Mrs. Syme, and Mrs. Boyd, who were perfectly competent to deal with the stock.

In Scotland trustees were a *quasi* corporation, who, contracting as trustees, bound themselves only to the extent of corporate property in the trust estate; see opinions of Lord Cranworth in *Lumsden v. Buchanan* (2), and Lord Campbell, in *Gordon v. Campbell* (3). See also Second Report of 349] Mercantile Law Commission, *1855. And the statutory right of resignation and of voting by a quorum could not be disregarded. The transfer framed at the office of the company was intended to hold out this assurance, "We (the directors) will accept you as trust disponees, as persons competent to bind a large estate, which we know is worth more than £70,000, and we hold you only liable to that extent."

The importance of the word "as" was shown by the decision in *Gadd v. Houghton* (4); there the words "on account of" were held to bind the foreign principal, and not the broker who executed the contract. The real effect of the

(1) 4 Macq., 950.

(2) 4 Macq., at p. 961.

(3) 1 Bell's Ap., at p. 458.

(4) 1 Ex. D., 357, 359; 18 Eng. R., 361.

transfer as between the transferors and transferees was altogether independent of the articles of copartnery; it was not a transfer of stock, but of trust. In the deed of partnership of the Western Bank (*Lumsden v. Buchanan*) the words "heirs, executors, and successors," implying personal liability, were used, whereas here only "heirs and successors" (*); and the words "successors and assigns" used in the transfer had special importance in the law of Scotland, owing to there being a right of resignation of the trusteeship under the statutes.

In the Companies Act of 1862, clauses 76, 77, 99, 101, and 105, provided for representative liability; but there was a general recognition in the act that there might be other cases than those enumerated; and Scotland was an exceptional case; in fact, if their contention and Lord Deas' opinion was correct, there was a representative liability there which would not be in England. The appellants were merely representatives of others within the 99th section. They had not agreed in accordance with the 23d section of the act of 1862 to become members, but were in the same position as persons who had applied for shares on conditions, not accepting them unconditionally.

They submitted that the contract was not *ultra vires*; but if the directors had no power to accept the appellants with the conditions, and in the capacity they offered themselves, then the transaction must be rescinded, the parties not being at one on the same radical point. The court could not fix upon a person alleged to be a contributory any engagement larger or other than that into which he had entered: *Waterhouse v. Jamieson* (*). That *case also decided [350] that the rights of creditors of a company when enforced by liquidators, must be enforced by them in right of the company, and they cannot recover that which the company itself could not; and therefore if there was a valid contract with the company it was as binding on creditors as it was on the company, and must be effectually carried out; and *Oakes v. Turquand* (*) was not inconsistent.

The transfer, which was the bond between the trustees and the company, showed that the intention of the appellants was to come into the company as trustee of one of its partners; even as in a private partnership a trust might be constituted of the shares of a partner without personal liability: *Bullen v. Sharp* (*). The decision in *Stace and*

(*) See opinion of Lord O'Hagan, *post*, p. 379.

(*) Law Rep., 2 H. L., Sc. 29.

(*) Law Rep., 2 H. L., 325.

(*) Law Rep., 1 C. P., 86, 102.

Worth's Case ⁽¹⁾ applied here, and amounted to this, that although a man might accept shares and come upon the register, and act as a director, doing acts becoming to the company, yet if it turned out his doing so was founded upon a contract which was an improper one and *ultra vires* of the company, the whole matter might be rescinded: see also *Carling's Case* ⁽²⁾, in making persons contributories the real contract must be looked to.

The articles of copartnership plainly showed that trustees and representatives of others were to be treated in a special way, distinct from partners, being debarred from attending meetings and becoming directors (clauses 13 & 14). The directors had full power to reject the appellants in their capacity of trustees, as they had also gratuitous transferees of shares: clauses 34 and 37. *Lumsden v. Peddie* ⁽³⁾ was the case of a *curator bonis* who accepted the transfer as such for his ward; but that case not coming on appeal to the House of Lords was no authority here. Therefore the appellants ought not to be held to incur this overwhelming liability in respect of a contract for which they reaped no benefit whatever; and which if fairly construed in view of Scotch law could never have been held to apply to persons in their position. Either the list of contributories ought to be rectified, or else the registration held as a nullity; the effect being to leave the transferors on the register as shareholders.

351] *Mr. *E. E. Kay*, Q.C., Mr. *Benjamin*, Q.C., Mr. *Davey*, Q.C., and Mr. *Kinnear* (of the Scotch bar), for the respondents, contended that the obligations of parties must be decided by looking at the contract of copartnership. The contract here imposed on all its members personal or individual liability for its debts and obligations; there was only one class of shares, namely, those of unlimited liability. The appellants did not deny that they became transferees of Mr. *Murdock's* stock which were shares of that kind, and therefore by clause 33 they took the place of their predecessors, and came under the same obligations. The directors had no power to make any special contract with the trustees limiting their liability, and none was made, but if there had been, it would have been *ultra vires* of the directors, and simply void, the appellants remaining partners and personally liable. Clauses 13 and 14 of the articles of copartnership referred to persons, who were not partners, but trustees, factors, or other guardians of partners who were incapaci-

⁽¹⁾ Law Rep., 4 Ch., 682.

⁽²⁾ 1 Ch. D., 115; 15 Eng. R., 676.

⁽³⁾ Court Sess. Cas., 3d Series, vol. v,

p. 34.

tated, such as bankrupts, infants, or persons *non compos*. These clauses read with clause 6 meant that a person might be the representative of an actual partner, and need not put himself on the register as such; the shares would then belong to the estate which he represented, but if a person became a partner himself, though only a representative one, he must be subject to all the liability of an original partner.

The bank was not a party to the deed of transfer at all; for all that was required to make the transferee a complete partner was a disposition by deed of the shares to him, and that that disposition should be intimated to the bank for registration. The mere production of the transfer to the bank *ipso facto* inferred the acceptance of the stock, clause 38, and all else in the deed beyond the disposition was surplusage. Registration under the Companies Act of 1862 had no greater effect than to regulate how the rights of creditors were to be enforced in liquidation, namely, through the official liquidators, and not by direct recourse to the shareholders: see also sects. 179 to 196.

As to the law in England, Lord Cranworth, in *Greenwood's Case*, gave a very lucid statement of the law regarding joint stock companies (*). In *Farhall v. Farhall* (†) an executrix opened a *banking account for the trust [352 estate, but the bank was not allowed to prove against the trust estate for a balance due. The case of trading by executor was stronger. On the other hand, as to the law in Scotland, the Lord Justice Clerk, in *Lumsden v. Buchanan* (‡), said that it seemed repugnant to the whole principle of joint stock law that any one should become a partner, and yet limit his liability by adding a modifying term to his signature (¶). The general rule was that the liability of trustees depended on the whole nature of the contract in each case: such words as "we contract as trustees" did not in every case limit liability; it must be a question of construction: Lord Cranworth (¶). So *Gordon v. Campbell* (¶), which was a case of a heritable bond granted by the trustees, "*qua* trustees only," over a trust estate in security of a loan, amounted to this, that in that particular contract the conclusion which the parties contracting intended was that the trust estate should only be liable. But a different question arose where trustees enter into a trading partnership, as here, which not only from its very nature, but also by

(*) 3 De G. M. & G., 476.

(†) Court Sess. Cas., 3d Series, vol. ii,

(‡) Law Rep., 7 Ch. Ap., 123; 1 Eng. at pp. 711, 712.

Rep., 468.

(¶) 4 Macq., 960, 961.

(¶) 4 Macq., 950; Court Sess. Cas., 3d Series, vol. ii, p. 695.

(¶) Court of Sess. Cases, 2d Series, vol. ii, p. 639; 1 Bell's App., 428.

the express terms of its constitution, imposed personal liability on all its members.

Bills or notes were obligations which, from their nature, imposed personal liability, although the trustees designated themselves "we trustees promise to pay:" *Thomson v. M'Lachlan's Trustees* (1); see also *Eaton v. Macgregor's Executors* (2). But even in contracts where the rights of third parties were not concerned, trustees had been held individually liable: *Higgins v. Livingstone*, road trustees (3); *Jeffrey v. Brown*, obligation for furnishings to a ship (4); *Thomas v. Walker's Trustees*, obligation to repair a house (5); *Nisbet & Co.'s Trustees*, obligation to payment of lease (6); also *Fairlie v. Neilson* (7); *Marquis of Abercorn v. Grieco*, obligation as to feu contract (8); see also *M'Laren on Wills and Succession* (9).

353] *The real meaning for the insertion of the words "trust disponees," was that it was always the custom for the trustees to give the fullest notice to the bank, so that it might appear in the records that they were such trustees; there never being a moment in the history of Scotch banking where notice of trustees could not be entered on the register. Lord Westbury said such notices of trusts was not to alter or control the personal contract, and obligation which the trustees had entered into, but to mark the property in the shares as belonging to the trust estate (10). *Lumsden v. Buchanan* (11) was almost identical in every way with this case; and especially in the similarity between the articles of copartnery there and those here. The word "as" certainly did not appear there, but it did in the case of *Lumsden v. Peddie* (12), where the *curator bonis* of a lunatic was held personally liable. The trustees in *Lumsden v. Buchanan* were original allottees, but that was rather against the appellant's contention that there was a special contract in their case. Trustees were not a corporation, and to say they were a quasi-corporation did not help the appellants. Lord Cranworth saying "the trust had *thus* something of a corporate character incident to it" (13), did not amount to saying it was a corporation. On the death of the last trustee

(1) 24 June, 1829; 7 S., 787.

(2) 25 May, 1837; 15 S., 1012.

(3) 1816; 4 Dow., 341, 355; also 4 Paton's App., 401.

(4) 7 S., 102; 2 Shaw's App., 349.

(5) 4 Dec., 1832; 11 S., 162.

(6) 10 Dec., 1802; Morr., 15,268.

(7) 18 Dec., 1821; 1 S., 211.

(8) 16 Dec., 1835; 14 S., 168.

(9) Vol. ii, p. 500-513.

(10) *Lumsden v. Buchanan*, 4 Macq., 955.

(11) Court Sess. Cas., 3d Series, vol. ii, p. 695; and vol. iii (H. L.), p. 89.

(12) Court Sess. Cas., 3d Series, vol. v, p. 34.

(13) 4 Macq., at p. 960.

the trust did not come to an end—all the obligations incident to the estate or the last trustee passed to his representative.

This was a completed transaction, and the company were not bound to recognize any stipulations. Even persons who became shareholders on special conditions will be contributories, although the conditions have not been complied with: *Lindley on Partnership* ('). *Bridger's Case* (') is most like this, if there was any condition at all here: see also *Waterhouse v. Jamieson* ('); *Oakes v. Turquand* ('); *Sir Edwin Pearson's Case* ('); *Daniell's Case* ('); *Nickoll's Case* ('); *Robinson's Executors* ('); *Davidson's Case* (').

*Mr. Napier Higgins, Q.C., in reply: The ap- [354
pellant's contention was not that there were two kinds of shares, but that there were several classes of shareholders, viz., ordinary shareholders; those of which the status as shareholders was in abeyance; and a class of persons who held shares for the bank—these last certainly could not be put on the list of contributories. This being the case, and, looking to the power of the directors, and the interest of the company, and that there was nothing express or implied in the terms of the articles of copartnership forbidding it, there was not much difficulty in coming to the conclusion that the company were fully warranted in entering into a qualified contract. Allotment of shares might also be made to a limited company who would only be liable in its corporate capacity. Neither the passage read from *Lindley on Partnership*, 4th ed., p. 1347, nor any of the cases there cited, had a material bearing on this question. In almost all those cases there was a clear compact to take shares, with or without some collateral agreement, some being decided on the ground of fraud. The rule applied in *Carling's Case* (') helped the appellant's contention that if the company did not take the shareholders on the same terms as they offered, there then was no contract at all. It was not correct that a mere disposition of the shares would make a man a partner; by clause 38 there was to be a special deed of transfer, it being the duty of the directors to see that such deed was properly prepared, and in proper form, and to a proper person. *Thomson v. M'Lachlan's Trustees* ('), a case of a promissory note, and the other cases cited by the respondents, did not apply. The terms of the transfer here were

(') 4th ed., p. 1347.

(') Law Rep., 9 Eq., 74.

(') Law Rep., 2 H. L., Sc., 34.

(') Law Rep., 2 H. L., 325.

(') 4 Ch. D., 222; on app., 5 Ch. D., 236; 22 Eng. R., 127.

(') 1 De G. & J., 372; 23 Beav., 568.

(') 24 Beav., 639.

(') 2 De G. M. & G., 517.

(') 3 De G. & Sm., 21.

(') 1 Ch. D., 115; 15 Eng. R., 676.

(') 24 June, 1829; 7 S., 787.

distinct and different from the terms of any document in *Lumsden v. Buchanan*. On the other hand, *Gordon v. Campbell* was an explicit authority in the appellant's favor. If this appeal was not successful the consequence would be disastrous not only to the appellants, but to the whole Scottish community; who, in the future, would be trustee? no one. The majority of the judges in the court below would have come to a different conclusion, were it not that they 355] thought that they were bound by the decision of *the House of Lords in *Lumsden v. Buchanan*, therefore if this appeal was allowed it would relieve the appellants from a ruinous and overwhelming liability, and would be more intelligible to ordinary minds, less repugnant to common sense, and more acceptable to the minds of the community.

The Law Peers having taken time to consider their judgment, delivered the following opinions.

April 7. EARL CAIRNS, L.C. (having stated the facts as above, p. 338): My Lords, whether, in any particular case, the contract of an executor or trustee is one which binds himself personally, or is to be satisfied only out of the estate of which he is the representative, is, as it seems to me, a question of construction, to be decided with reference to all the circumstances of the case; the nature of the contract; the subject-matter on which it is to operate, and the capacity and duty of the parties to make the contract in the one form or in the other. I know of no reason why an executor, either under English or Scotch law, entering into a contract for payment of money with a person who is free to make the contract in any form he pleases, should not stipulate by apt words that he will make the payment, not personally, but out of the assets of the testator. If, for example, A. B., the executor of X., contracted to make a payment as executor of X., and as executor only, to C. D., it would be difficult to suppose that any obligation except an obligation to pay out of assets was intended. C. D. in the case supposed would have authority to accept a contract so limited, and the words used could have no meaning, and could be referred to no object other than that of limiting responsibility. I do not know that there is in this respect any difference in principle between English and Scotch law, although there may be a difference in the application of the principle. It may be (I will not say more) that, from the English system of judgments in actions at common law, and from the difficulty of obtaining a judgment *de bonis testatoris* founded upon an engagement made by the executor, the English

courts have leaned against a construction which would not *result in a judgment *de bonis propriis*: whereas in [356 Scotland, where law and equity were jointly administered, such a difficulty did not arise.

But the first question, whether in Scotland, or in England, must be, What is the contract into which the parties have entered? and that must be accompanied by another question, What is the contract into which the parties were competent to enter? For if words have been used of any ambiguity, or the object of which may be open to any doubt, that construction must, according to the well-known rules of law, be given which will make the contract a legitimate and valid one, and not that construction by which the contract will be destroyed.

Now it is to be observed that the directors of the bank were a body with limited and clearly defined powers and acting in the execution of a delegated and limited authority. The appellants must be taken, as must all persons who deal with the directors of a company, and especially those who deal with the directors for admission into the company, to have known the nature and extent of the authority of the directors, and the character of contract which they were empowered to enter into. With regard to the directors also, it is to be borne in mind that if they exceeded the powers committed to them by the deed of partnership, if they placed the stock and capital of the bank in the power of persons brought upon the register upon terms less favorable to the other shareholders than the deed authorized, the directors would incur a liability to their constituents for so doing, and it is not to be supposed that they intended to incur this liability.

With these observations I will now ask your Lordships to bear in mind the general scope and provisions of the deed of partnership.

There is no limit of liability whatever for the shareholders of the company. The deed takes notice that the shareholders might be individuals or companies and bodies corporate; but the scheme of the deed is that the shares shall be held by individuals or by companies (that is to say, partnerships consisting of individuals), or by corporations, without any limit of liability in the individual *so far as he has [357 property, or in the corporation so far as it has property. And, I need hardly observe, that there was no power by law to affix any limit of liability upon the shares, except by a resort to statutable arrangements, which in this case were not resorted to.

By the 4th section of the deed the parties bound themselves to contribute and pay when required the sums of money corresponding to the number of shares of the stock subscribed. By the 5th section the partners are to have the right to the profits, and to be liable for the losses, and bound to relieve each other of all the debts and engagements of the company in the proportion of their respective interests or shares in the capital stock. By the 6th section any person holding a share, whether as an assumed subscriber, or as a purchaser, heir, or other representative of a subscriber, shall be entitled to all the rights and subject to all the liabilities of an original partner of the company. The 13th and 14th sections contain careful provisions for the purpose of preventing any person interested in a share, other than the partner in whose name the share stands on the register, from attending or voting or interfering with the concerns of the company. The 33d and 34th sections relate to transfers. The shares are to be transferable by the partners, and shall transmit and descend as personal property to their executors or representatives by testament. Every partner who shall dispose of his share of the company's stock agreeably to the regulations therein written, or who shall cease to have an interest in the concern through forfeiture or otherwise in the terms of the deed, shall be entitled to relief of the whole debts owing by the company, and the party or parties acquiring the shares so disposed of, or otherwise coming in right of the party or parties so ceasing to have interest, shall take and assume the place and liability of his author, ancestor, or other cedent. A gratuitous assignment by a deed *inter vivos* of any shares is to be effectual if sanctioned by the directors. If they withhold their sanction the share is to be sold by the directors and the price accounted for to the assignee. Shares may be disposed of onerously, but the name of the purchaser and the price must first be intimated to the directors, who are to have the option of purchasing for the bank. By the 37th section it is provided 358] *that where the shares of any partner are transferred, conveyed, or sold in terms of the article, the deed of transference shall be prepared at the head office; and the 38th section provides that this deed of transference, and also every assignment of shares in security or *mortis causa* and confirmations thereof by right of succession, shall be recorded in a book to be kept for that purpose, and the production of such writings to the manager or directors for registration shall, *ipso facto*, infer the acceptance of the capital stock therein specified and the liabilities of the parties

having a right to the same as partners of the company; but no purchaser or other assignee of or successor to shares so acquired shall be recognized as a partner until his title is recorded in the books of the company. The 40th section provides that the person or persons, companies or corporations whose names shall at any time stand in the stock ledger containing the list of partners of the company, whether as original or assumed partners, shall be deemed and taken to be the proprietors of the several shares standing in the ledger in their respective names, and shall be liable to the payment of every call for instalments of capital stock to be made therein, and to all actions, suits, obligations, forfeitures, and penalties, and entitled to the whole profits and liable for all the losses to which the original proprietors of shares in the company are subject, liable, and entitled to by the deed, and the names entered in the ledger and the amount of shares shall be the sole evidence receivable at any meeting of the partners as to the right of voting at the meeting.

I have now referred to the principal clauses of the deed, and it is upon the terms indicated in these clauses, and upon those terms alone, that the directors had any authority to admit an assignee of shares as a partner into the bank. The scheme of the deed is clear. The bank is to consist of partners, and these partners are to be either individuals or corporations. There is no limit of liability. If the partner is an individual he is absolutely liable, to the extent of his means as an individual, for the proportion of the debt of the bank attributable to his share. If the partner is a corporation the corporation is liable to the extent of all the property which it may possess.

It is necessary to contrast with this the contract which the *appellants allege was entered into between them [359 and the bank, by reason of the use in the transfer to them and in the stock ledger, of the words "as trust disponees of Mr. Syme and Mrs. Boyd." The appellants undertook, as they say, to be liable in the obligation incumbent on holders of stock to the extent only of the trust funds under their administration. In the view of the appellants there were as to these shares to be no partners of the bank individually liable. The liability as to these shares was not to be the liability of the trustees, but the liability of certain funds under the administration of the trustees. As to what these funds might be nothing is said. The trust might consist of nothing more than the shares themselves, and thus the shares be their own security; or the trust funds might

be such as that, in a due course of administration, they might all be parted with before any liability came to be enforced against them. The bank would be obliged to consider and scan every deed of trust in order to determine whether the trust funds could, under the trusts declared, be properly used in the purchase of bank stock, or in the payment of bank liabilities. But putting these considerations aside, and assuming that the trust funds were a definite, declared, and always available sum of money, what would this be but the creation of shares with a limited liability? And if this limit of liability could be created for some shares in the bank, why not for all the shares in the bank? If the argument of the appellants is right, what would there be to prevent every share in the bank being held by trustees who would be furnished with as a trust fund the precise amount to be paid upon the share, and would have no further liability? But this is just what the law would not permit to be done with regard to a joint stock company of this kind, except by means of the constitution of a company with liability limited according to the statute; and such a company the Glasgow Bank never was.

My Lords, I have no hesitation in saying that in my opinion the directors had no power under their deed, and the appellants must be taken to have known that they had no power, to enter into or accept a contract of this description; and the contract if attempted to be made would have been *ultra vires* and void. But for this very reason, it appears to me to be necessary that your *Lordships should consider whether the words upon which the appellants rely require a construction which would invalidate the contract in which they occur.

Now these words are "as trust disponees of Mrs. Syme and Mrs. Boyd." My Lords, I do not wish to say that, in a case in which such a contract would be within the competence of the contracting parties, and where these words could not be referred to any other object or purpose, they might not, on the construction of the whole instrument, be held to negative the idea of personal responsibility. But I have endeavored to show your Lordships that such a contract would not be within the competence of the parties in the present case, and there is no difficulty whatever in assigning to the words a meaning and a purpose clear, intelligible, and within the limits of the contracting power of the directors. One object of these words, and one purpose served by them, is noticed in the judgment of the Lord President and Lord

Shand. The Lord President says⁽¹⁾ that the practice of using them and of entering them upon the register arose, "not for the purpose of altering the liability of the holders of such stock as compared with the other holders of stock in the same company, but only for the purpose of marking the stock as the property of the particular trust named in the transference and in the register." The Lord President further observes, that it was the Scotch practice of marking trust stock in this way which prevented the Legislature extending to Scotland the enactment that no joint stock company should take notice of any trusts on its register of shares; and I may add there is no doubt that a permission to notice trusts on a register of shares is *prima facie* a permission introduced for the benefit of the beneficiaries and not of the trustees. Lord Shand observes that the law of Scotland as to proof of trust is very stringent "in requiring that in all cases the averment that property is held in trust shall be proved only by a writing subscribed by the alleged trustee, or by his oath on reference; and that no more effectual way of avoiding the dangers of this limited mode of proof can exist than by having the title to the trust property qualified by a declaration on its face that the property is held for *behoo of [36] others." A second purpose served by the words is, that they make it clear that the shares are held upon a joint account with a right of survivorship, and that they do not belong to the persons named on the register as tenants in common. It is possible (I will not say more) that there may be a third purpose served by the words founded on the law of Scotland, which gives peculiar facility to a trustee for retiring from the trust, and which might justify in the case of a retiring trustee a simpler mode of removing his name from the register than in the case of another joint owner.

My Lords, I have not up to this point referred to any authorities bearing upon the question, and even in the absence of authority I should have been of opinion, for the reasons I have stated, that the appellants were personally liable in respect of these shares. I should have been of opinion that it was incompetent for the directors of the bank to have made with them any contract but a contract of personal liability, and that the words relied upon by the appellants as limiting liability were introduced for and served a different purpose.

But, my Lords, almost the whole of the observations which I have made will be found, as it seems to me, to be sup-

⁽¹⁾ Scotch Law Reporter, vol. xvi, p. 147; Court Sess. Cas. 4th Series, vol. vi, pp. 398, 410.

ported by two authorities, decisions of your Lordships' House, and which will be the only cases to which I shall feel it necessary to refer your Lordships.

The first of these is the case of *Gordon v. Campbell* ⁽¹⁾. In that case certain trustees borrowed, for the purpose of their trust, from Colonel Gordon, of Cluny, £7,000, and granted an heritable bond over the trust property to secure the loan; they also bound themselves, "as trustees aforesaid," to make payment of the loan; and in the clause of warrandice of the land they bound themselves "*qua* trustees only" to warrant at all hands and against all mortals.

Now this was exactly such a case as in the earlier part of my observations I supposed might arise. It was perfectly competent to Colonel Gordon and these trustees to make any contract they pleased. Colonel Gordon might have insisted that they should be personally liable to him, or he 362] might have agreed that they should *only be liable as trustees, i.e., to the extent of their trust funds. They professed in one part of the instrument to contract "as trustees," and in another "as trustees only;" and it was obvious that they meant in both places to contract in the same way. Further, if these words "as trustees" and "as trustees only," were not introduced to limit liability, there was no other purpose in the deed which they could possibly serve. They were absolutely unmeaning if they did not mean that the trustees were not contracting as individuals. Under these circumstances, the Court of Session, and afterwards this House, held that there was no personal liability created against the trustees beyond their possession of the trust funds.

The other case was that upon which so much of the discussion before your Lordships in the present appeal took place, the case of *Lumsden v. Buchanan* ⁽²⁾. The principal respondents in that case had signed a deed of accession for shares in the Western Bank. In the testing clause their names and designations were followed by the words "trustees for Mrs. Ellen Brown, the majority surviving being a quorum;" and in the register of shareholders their names and addresses were entered, with the addition of the words "trustees for Mrs. Ellen Brown." This House held that the trustees were personally liable. The observations of the Lord Chancellor and of Lord Cranworth have been so frequently referred to during the argument of the present ap-

⁽¹⁾ Bell's App., 428.

⁽²⁾ Court Session Cases, 3d Series, vol. ii, p. 695; and vol. iii (H.L.), p. 89; 4 Macq., 950.

peal, that I will not here repeat them. They appear to me to apply conclusively to the present case, and the decision of your Lordships in *Lumsden v. Buchanan* appears to me to derive, if it were possible, additional strength from the circumstance that my late noble and learned friend Lord Kingsdown stated that it was with some hesitation and regret he felt obliged to concur in the judgment, and from the further circumstance that this House had before it a most full and learned examination of the subject from all the Scotch judges, of whom at that time four had declared themselves in favor of the appellants in *Lumsden v. Buchanan* and eight in favor of the respondents.

My Lords, I ought to observe that in *Lumsden v. Buchanan* (*) "the words in the deed and in the register [363] were "trustees for Mrs. Ellen Brown" not "as trustees." In a case, however, in the same bank, which occurred immediately afterwards, *Lumsden v. Peddie* (†), Peddie was *curator bonis* to Mrs. Broomfield, and he accepted the stock in these words: "I the said D. S. Peddie, as *curator bonis* foresaid, do hereby agree to take and accept the said capital stock, and as such bind and oblige myself," &c. The Lord Ordinary, in that case, and afterwards the Court of Session, held that the case was governed by *Lumsden v. Buchanan*, and that the introduction of the word "as" made no difference. From this decision there was no appeal. The Lord Justice Clerk in giving judgment in that case observed "It is now well settled that in this or any the like company no one can become a partner with a limited liability, or with any other liabilities than such as are borne in common by all the partners."

My Lords, this decision must be taken along with that of *Lumsden v. Buchanan*, and shows what was then understood in Scotland to be established as the law in such cases.

On the whole, my Lords, I am of opinion that the decision of the Court of Session now under appeal is correct, and I must move your Lordships to dismiss the appeal. It is difficult to use words which will adequately express the sympathy I feel for all those who have been overwhelmed in the disaster of the Glasgow Bank; and that sympathy is peculiarly due to those who, without possibility of benefit to themselves, and probably without any trust estate behind sufficient to indemnify them, have become subject to loss or ruin by entering, for the advantage of others, into a partnership attended

(†) Court Session Cases, 3d Series, vol. ii, p. 695; and vol. iii (H.L.), p. 89; 4 Macq., 950.

(*) Court Sess. Cas., 3d Series, vol. v, p. 34.

with risks of which they probably were forgetful or which they did not fully realize. The duty of your Lordships is, however, to declare the law, and of the law applicable to this case your Lordships can, I think, entertain no doubt.

I move, my Lords, that the appeal be dismissed; and if no other arrangement has been made between the parties it must, I conceive, be dismissed in the usual way, with costs. 364] *LORD HATHERLEY: My Lords, it would be impossible to come to any other conclusion in the present case than that which has been already announced as the conclusion arrived at by my noble and learned friend on the woolsack. Most anxiously does one scrutinize every case, especially every case presenting an appearance in any degree whatever of novelty, in order to see that the edge of justice is administered duly and not with undesirable sharpness. But, my Lords, this case really did appear to be one in which the appellants must have been painfully conscious from the first opening that they had to struggle against that which had been settled and determined by the highest Court of Judicature, and which in reality, therefore, was not open to revision by any court whatsoever. In vain did I listen during the argument for that which I was most anxious to hear; whether or not there had been any failure of justice in the case of *Lumsden v. Buchanan* (¹); there was no distinction which could be made in any way available pointed out between the cases. The last distinction which was referred to by the Lord Chancellor, namely, that of the introduction of parties "as trustees," seems to have existed in the subsequent case of *Lumsden v. Peddie* (²); and in that case the distinction was not found to be available, or not so available as for it to be thought possible that an appeal could be founded upon it. The distinction raised before us was that in the one case new shares were applied for, and that in the other case shares were accepted by way of transfer, being dealt with in the open market. I apprehend, my Lords, that there can be no distinction founded upon any such thin discrepancy as that. The real point of the whole case is, as it appears to me, summed up in one or two clauses of the contract of copartnership. [His Lordship here read the 4th, 5th, and 6th clauses.]

My Lords, what are these great companies in fact? They are very large and extensive partnerships. Every partnership, as we all know as a matter of almost elementary juris-

(¹) Court Session Cases, 3d Series, vol. ii, p. 695; and vol. iii (H.L.), p. 89; 4 Macq., 950.

(²) Court Sess. Cas., 3d Series, vol. v, p. 34.

prudence, involves equality of liability, and equality of participation in the profit and *loss; or if not equal- [365
ity of participation, at all events, participation upon some proportion analogous to equality, upon which the whole basis of the transaction stands. It does not depend upon who are the holders of the shares; the shares themselves are the things which regulate on the one hand the responsibility of the person who is the owner of those shares, and on the other hand the advantage and profit which the person who is the owner of that share is to acquire. Whosoever at any given time, be it for profit or be it for loss, finds his name attached to the ownership of a given number of shares, that person has to deal with those shares as provided by these articles of partnership deed, namely, to contribute to the loss and to share in the profit in proportion to the number of shares that he holds. That at once differs the case from that of *Gordon v. Campbell* (¹), because in that case it was held that by the terms of the bond any person who stipulated or acted as trustee could say that he stipulated or acted as trustee only; which is the just reading of that deed. But when a person says that, you must find whether the persons with whom he is dealing have power to deal with him on such terms. In the case of *Gordon v. Campbell* (¹) all the parties were *sui juris*, and had power to deal as they thought fit; but here when you are dealing with a company, either in applying for new shares, or in buying shares in the share market and bringing them to be registered, which made you a shareholder in the company, upon what terms do you become a shareholder? You must become a shareholder upon the original terms, and upon no other terms. The directors have a good many powers of an extensive description—powers when shares are offered for sale to purchase on behalf of the company, and a variety of other powers not altogether usual in companies of this kind, but those powers which they have are the only powers they are entitled to exercise, and there is no power in the deed to allow them to treat a certain set of shares in the company as being held by a different tenure from all the other shares, to be held as far only as certain particular estates will hold out. So that, as has been observed already, you might, to take an extreme case, imagine almost every lot of shares to be held upon different tenures as between the different proprietors of those shares, *whereas the true principle [366
from beginning to end of the deed, and the principle which, as I apprehend, was determined in the case of *Lumsden v.*

(¹) Bell's App., 428.

Buchanan (1), was this: that those who are partners under a deed of this description take their profits and bear their losses according exactly to the number of shares which they hold.

As regards the introduction of the names of the trustees "as trustees" on the share list, we, perhaps, in England are a little surprised at it, because we have now long been accustomed to the practice of companies which first began with the Bank of England, which has always refused to recognize trusts at all; and the same practice has been adopted by railway companies and the like, in which wisely, or unwisely, trusts are not recognized upon the face of the share list. We are surprised to find any recognition of this trust; but the use of it one can easily see. With all its advantages, the rule of the Bank of England is productive sometimes of great inconvenience. I have myself known cases of considerable inconvenience where a man has become, say, the surviving trustee of three trustees; perhaps he has in the bank £5,000 or £6,000 of his own, and £10,000 as a trustee; and some day, when he goes to the bank, he will be surprised to find that he has £15,000 of stock, because the bank will not recognize trusteeship at all; and he finds himself registered as the owner, not only of his own stock, but of the stock that he holds upon trust. That is not always the most convenient arrangement, and sometimes it leads to worse accidents than that, because, if the last survivor of three or four trustees happens to be a person of dishonest character, he is the sole proprietor and has the sole command of the stock, and the bank is entirely free from all responsibility in dealing with it. That appears to have been thought, as the learned judges say, not a desirable position to place matters in, and therefore, for the sake of the *cestui que trust*, notice is taken upon the face of the bank books of the existence of the trust; and also a second advantage accrues to him, namely, that when changes take place in the trust, then there is a note in the bank books which tells you that a change has occurred, without the necessity of 367] having a new deed entered for the purpose of saying that such a change has been made, and parties are thereby liberated from some expense and from a good deal of inconvenience.

Many reasons may be assigned for it, but whatever reasons may be assigned, it is impossible to hold that the other shareholders, who have either entered into the original con-

(1) Court Session Cases, 3d Series, vol. ii, p. 695; and vol. iii (H.L.), p. 89; 4 Macq., 950.

tract of partnership, or have become shareholders since in a bank like this which we have now before us, can repudiate responsibility as shareholders on the averment of anything professed to be done on their behalf by the directors contrary to the general stipulations of the deed. The directors can only do that which their power and authority entitles them to do; and in vain one has asked to have any passage pointed out in this deed which authorizes the directors, in dealing with different lots of shares, to manipulate them in such a way that one lot of shares may go into one trust, and another lot into another trust, and a third lot into no trust at all, and that those shares may, in the event of disaster to the company, be held upon a different footing from the other shares; so that, so far from partaking, according to the number of their shares, in the profit and loss, it would be found that there was, as regards a very large proportion of the individual shares of the company, a regulation set up contrary to the express stipulations of the deed.

I am only saying what I believe to have been the principle in the case of *Lumsden v. Buchanan* (''); and beyond the case of *Lumsden v. Buchanan* I have not the inclination, nor do I see in any way how your Lordships have the power, to go.

LORD PENZANCE: The question involved in this appeal, though one of the deepest interest to the parties concerned, does not depend for its solution upon any very numerous or intricate considerations.

It is not to be denied that the appellants, on the face of the transfer deed into which they entered with the banking company and whereby they became shareholders in it, announced in express terms that they did so "as trust dispo-
nees" for other people.

The question is, whether the statement of this fact has in any *degree exonerated them from the obliga- [368
tions which attached to the character and position of shareholders which it was the object of that deed to confer upon them.

Speaking generally, there might no doubt arise an inference (if not rebutted by other circumstances) that a person who derived no benefit himself, and who acted only for the benefit of others, in contracts or engagements of any kind into which he might enter, would not intend thereby to expose himself to personal liability if it could be avoided. A general consideration of this character has, I think, largely

(') Court Session Cases, 3d Series, vol. ii, p. 695; and vol. iii (H.L.), p. 89; 4 Macq., 950.

pervaded the reasoning upon which the exemption of the appellants from personal liability has been based and enforced in argument.

But meanwhile it will not be doubted that a person who, in his capacity of trustee or executor, might choose to carry on a trade for the benefit of those beneficially interested in the estate, in the course of which trade debts to third persons arose, could not avoid liability on those debts by merely showing that they arose out of matters in which he acted in the capacity of trustee or executor only, even though he should be able to show, in addition, that the creditors of the concern knew all along the capacity in which he acted.

The case of an agent who acts for others is, of course, entirely different. His contracts are the contracts of his principal; and the liabilities from which, as a general rule, he is personally exempt, fall upon his principal who acted through him.

But to exonerate a trustee something more is necessary beyond the knowledge of those who deal with him that he is acting in that capacity, and it would not be sufficient in all cases to state that fact on the face of any contracts he may make. To exonerate him it would be necessary to show that upon a proper interpretation of any contract he had made, viewed as a whole—in its language, its incidents, and its subject-matter—the intention of the parties to that contract was apparent that his personal liability should be excluded; and that although he was a contracting party to the obligation the creditors should look to the trust estate alone.

These propositions are, I conceive, conformable to the law of Scotland, equally with that of this country.

It is not enough, then, in the present case, to show that 368] the *appellants on the face of the transfer deed accepted the "stock" in question "as trustee disponees;" but they must go on to show that the proper construction of that instrument showed the intention of the parties to be that, being trustees, they should not be personally liable.

It becomes, then, material to inquire what was the nature of the partnership whose "stock" they agreed to accept, and in whose business they agreed to become partners—and how far the nature of that "stock" and the constitution of that partnership, is consistent with the exemption which they now claim.

The constitution of this banking company was framed and declared by the partnership deed to which reference has

been made. It provides for one class, and for one class only, of shares and shareholders, and declares in express terms that the partners shall have a right to the profits, and be liable to the losses, and bound to relieve each other of all debts and engagements of the company, in the proportion of their respective interests or shares in the capital stock thereof.

The exact provisions of the deed in this respect have been recalled to the attention of your Lordships by the Lord Chancellor, and it is needless to repeat them.

This deed the appellants have not actually signed, but they have executed the deed of transfer, in which they have expressly declared their acceptance of the stock in question upon the footing that they should be "subject to all the articles and regulations of the said company, in the same manner as if they had subscribed the contract of co-partnership."

Having thus become shareholders in a partnership the members of which have by their deed of partnership agreed to stand upon an equal footing, one with the other entitled equally to the profits, and bound equally to the losses,—the question is raised whether, by stating in their deed of transfer that they so became shareholders as trust disponees for other persons, the appellants have altered or limited the obligations that otherwise would attach to them. In my opinion they have not.

There are many contracts in respect of which if a man were to state, in contracting, that he only did so as trustee, it is quite conceivable that his contract might be construed as not being *intended to bind himself personally. [370 The case of *Gordon v. Campbell* ⁽¹⁾ offers an example of such a construction.

Other cases may be easily imagined in which on the one hand the intention to restrict the liability of the person contracting may be clearly inferred from the character in which he declared that he contracted, taken in connection with the other circumstances of the case, and in which, on the other hand, nothing is to be found inconsistent with that restriction in the subject-matter of the contract.

But in this case the subject-matter of the contract was the "stock" of an association whose shares were, by the very terms of its constitution, to be held only by persons who were all to be personally, and equally, liable to its obligations—and it cannot be held that the liabilities in respect of this "stock" were intended to be restricted by the words

(¹) 1 Bell's App., 428.

“as trust disponees” without ignoring the very nature and inseparable incidents of the thing which formed the subject-matter of the contract.

In a word, it comes to this: Such a thing as a share in this association, with a limited liability in the holder of it, did not exist—no such share or “stock” had ever been created—no provision is made for it in the partnership deed; and every provision to be there found which speaks of the liability of those who hold the shares is diametrically and in the most express language opposed to it. If, then, the appellants did not become bound to the liabilities attaching to ordinary shares, and ordinary shareholders, they did not become bound at all, and the contract of transfer would be void.

But before your Lordships can arrive at such a conclusion you must, I think, be at least satisfied that the words “as trust disponees,” in this particular deed, so clearly imported an intention not to undertake the obligations of shareholders (though the entire contract might thereby be rendered contradictory and absurd) that they could have been introduced for no other purpose. For if a reasonable interpretation can be assigned to these words, which would permit the deed to stand as a consistent one competent to effect that transfer of stock which it was the obvious intention of the parties to bring about, your Lordships would be bound to accept that interpretation.

371] *Such a reasonable interpretation was suggested in the case of *Lumsden v. Buchanan* ⁽¹⁾, and is referred to by the Lord President in his judgment in the present case. His Lordship says: “Hence arose the practice referred to in *Lumsden v. Buchanan* of taking notice of trusts in the transference and registration of such stocks, not for the purpose of altering the liability of the holders of such stock as compared with the other holders of stock in the same company, but only for the purpose of marking the stock as the property of the particular trust named in the transference and in the register” ⁽²⁾.

The whole question then is, as it seems to me, one of construction as to the proper interpretation to be put upon this transfer deed and the acts of the appellants under it, and for the solution of that question your Lordships have before you these two alternatives—on the one hand a construction which gives a reasonable and efficient meaning to the words

⁽¹⁾ Court Session Cases, 3d Series, vol. ii, p. 695, and vol. iii (H.L.), p. 89; 4 Macq., 950.

⁽²⁾ Scottish Law Reporter, vol. xvi, p. 147; Court Sess. Cas., 4th Series, vol. vi, p. 400.

“as trust disponees” and is not inconsistent with that transference and acceptance of “stock” which was the sole object of the instrument—and on the other hand a construction which defeats the intended transfer of stock altogether, and reduces the deed of transfer to a nullity. According to all known principles of construction, your Lordships are, I apprehend, bound to accept the construction which gives effect to the instrument.

A great deal was said in the course of the argument as to the difference between the law of Scotland and that of England regarding trustees. But the principles upon which written instruments are to be construed, and particularly the principle to which I have just alluded, that any construction which invalidates the instrument altogether ought to be rejected, if a reasonable construction can be found which gives effect to it, are surely common to the law of both countries. And in whatever light the law of Scotland may regard trustees, if it does not go the length of regarding them as corporate bodies (which it has been admitted it does not) they must, I think, remain liable upon contracts and engagements into which they have personally entered, and in which no exemption from that liability is to be [372 found expressed or properly implied.

I have offered these remarks to the House upon the footing of the matter being “*res integra*,” but in truth the present case is, in my opinion, governed in principle by the case of *Lumsden v. Buchanan* ⁽¹⁾.

What the principle involved in that decision was, is, I think, rightly appreciated and declared by the learned judges in the Court of Session.

The Lord President said the rule of liability then established might be stated in a single sentence, as follows: “Persons becoming partners of a joint stock company such as the Western Bank, and being registered as such, cannot escape from the full liabilities of partners, either in a question with creditors of the company, or in the way of relief to their copartners, by reason of the fact that they hold their stock in trust for others, and are described as trustees in the register of partners, and the other books and papers of the company.” And Lord Deas said that the grounds of decision in *Lumsden v. Buchanan* “resolved themselves into this, that where trustees join in a contract of partnership for trading purposes, such as a contract for carrying on the business of banking, the mere designation of them as being

⁽¹⁾ Court Session Cases, 3d Series, vol. ii, p. 696, and vol. iii (H.L.), p. 89; 4 Macq., 950.

trustees will not exempt them from the same personal liability as is undertaken by the other partners, or limit their liability to the value of the trust estate."

It is matter for deep concern, not unmingled with surprise, that the legal effects attaching to these contracts of trustees having been thus asserted and exposed in a notable case as long ago as the year 1865, people should have been found still willing to enter into them.

But in all probability the profound conviction with respect to the great banks in Scotland that such a thing as loss or liability was not to be practically apprehended at all, may have led to a widespread indifference as to the legal consequences of this improbable event, should it ever come to pass.

Be this, however, as it may, your Lordships, while bound 373] to *give effect to the lawful rights of the creditors, will not the less commiserate losses and sufferings which, in their amount and intensity, rise to the level of a national calamity.

LORD O'HAGAN: My Lords, I agree with my noble and learned friend on the woolsack, that it is impossible to approach the decision of this case without feelings of the deepest pain. That persons undertaking the onerous duties of trustees, from kindness to others, and without the smallest view to their personal advantage, should be involved in ruinous responsibilities which, in many cases, may not have been within their contemplation when they accepted the trusts, must be regarded as a calamity, appealing to our sympathy and compelling our regret. But we are bound simply to regard the legal rights and obligations of the parties before us; and I am constrained to the opinion that the unanimous judgment of the Court of Session must be affirmed.

My Lords, the question in this appeal appears to me to be concluded by authority, and I do not feel that it is necessary to discuss the grounds on which the decision in *Lumsden v. Buchanan* ⁽¹⁾ was founded, as it would have been if the matter were *res integra*. Those reasons have been shown, by my noble and learned friends who have preceded me, to have been very cogent; but I am content to rest on the decision of the House in a case which I think undistinguishable, in any material particular, from that before us. I shall only refer to the arguments by which it was justified, as ap-

⁽¹⁾ Court Session Cases, 3d Series, vol. ii, p. 695, and vol. iii (H.L.), p. 89; 4 Macq., 950.

plicable to both of them and as establishing identity between them.

The question is one of contract and construction, and the contract of the trustees in *Lumsden v. Buchanan* (') was in substance, and, as I shall indicate immediately, almost precisely in terms, the same as that with which we deal in the present case. There, as here, it was rightly urged that the directors of a company founded on the principle of unlimited liability had no authority to admit shareholders on terms inconsistent with that principle. The competency of the directors of the Western Bank was held to be bounded *by the provisions of their deed of copartnership. [374] They had obtained no statutable powers under the Limited Liability Acts. They had received no authority from the individual shareholders to alter or modify the conditions of membership of the company. There was no pretence for saying that the words of the deed, and the undertakings of the allottees or transferees, had relation to anything but liability without limit; and, therefore, it was expressly held, as a main foundation of the judgment in that case, that the directors, being incompetent to qualify the responsibility of the shareholders on the ground of trusteeship, or create a limited liability unauthorized by statute, should not be assumed to have attempted an act quite *ultra vires*, if the terms of the contract of the trustees were, in any reasonable way, capable of reconciliation with the proper discharge of their duty and the true effect of the copartnery deed.

The custom to notice trusts on the register in Scotland was assumed in the Court of Session and in this House to have arisen for the purpose of facilitating the proof of the character of the property, and not as qualifying the liabilities of the shareholders, inasmuch as the Scotch law requires evidence of trusteeship, either by the oath of the trustee or by a writing under his hand, which cannot always be obtained; and this was taken as a sufficient account of the reason of the thing. The maxim, "*ut res magis valeat quam pereat*" was applied; and it is plain that this ground of decision is as applicable here as it was in *Lumsden v. Buchanan* (').

Then, it was determined that the terms of the deed in the *Lumsden* case had no contemplation of more than one class of shareholders, and no regard to a distinction between fiduciary liability and personal liability. The reasons for hesi-

(') Court Session Cases, 3d Series, vol. ii, p. 695, and vol. iii (H.L.), p. 89; 4 Macq., 950.

tating to admit such a distinction with a view to commercial policy and results, have already been pointed out; but, in my view, it is enough to say that that case and this are identical in the want of a pretence for making the distinction. If, in *Lumsden v. Buchanan*, one class of shareholders only was admissible, with equal privileges and equal [375] responsibilities, it is impossible to find *authority for admitting another in the contract of copartnership of the City of Glasgow Bank.

In the next place, the conditions of partnership in *Lumsden v. Buchanan* (') were in no way more stringent or more absolute, for the purpose of creating the largest liability, than in the present case. The appellants accepted a transfer of the stock of Mrs. Syme and Mrs. Boyd, "with the whole interests, profits, and dividends that may arise and become due thereon, the said (appellants) by acceptance hereof, being in terms of the contract of copartnership of said bank subject to all the articles and regulations of the said company:" and declaring that they accepted of the transfer "on the terms and conditions above-mentioned." The acceptance was made by them "as trust disponees;" but it bound them to "all the articles and regulations" of the company. I shall not again go over those "articles and regulations," to which my noble and learned friends have sufficiently referred in detail. But I would advert to the stock certificate, procured by the appellants, referring to the entry of the names in the stock ledger, and describing them as "holders" of the stock; and then point to the 6th section of the contract of copartnership, which is in these terms: "Any person holding a share of the said capital stock, whether as an assumed subscriber or as a purchaser, heir, or other representative of such subscriber, shall be entitled to all the rights and subject to all the liabilities of an original partner of the said company." I shall only further refer to the 40th section [which his Lordship read].

Now, looking to the contract of the appellants as the transferees of the shares, and the "articles and regulations," by which they bound themselves to abide, nothing can be conceived more full and conclusive, more absolute and unconditional, than the acceptance on the one side, and the assumption of liability on the other. It is not pretended that, in this respect, the contract of copartnership of the Western Bank differed materially from that which we have

(') Court Session Cases, 3d Series, vol. ii, p. 695, and vol. iii (H.L.), p. 89; 4 Macq., 950.

been considering. Indeed, it is hard to imagine any collocation of words more decisive for the purpose of negating any distinction between classes of shareholders or any difference in their respective *obligations—and, therefore, [376 in the important matter of the specific terms of the contracts, *Lumsden v. Buchanan* (') is wholly undistinguishable. Both those contracts were manifestly framed with a view to the maintenance of the recognized rule which establishes mutuality of right and responsibility *inter socios*, and divides the profits and the losses among all the members of a partnership according to their respective interests. In neither is there the least indication of a desire or design to depart from that rule, by creating an exceptional class with peculiar immunities.

The words of Lord Kingsdown, whose hesitation, I agree with the Lord Chancellor, as to the judgment in *Lumsden v. Buchanan*, gives to his ultimate concurrence with the other Law Lords peculiar force and significance, are important upon this point: "When persons (he says) have signed deeds of this description, it would be very dangerous to permit them to relieve themselves from the obligation of covenants into which they have expressly entered, on any speculation founded on mere probabilities that they did not really intend what the deed, in terms, expresses. Now, unless the covenants by which the parties subscribing the deed bind themselves, their respective heirs and successors, in the third clause of the first deed, and the second deed of succession, can be read, so as by some interpretation to exclude those who sign as trustees, it is not disputed that the covenant imposes personal liability, and there seems to be, in this, insuperable difficulty" ('). I shall have to observe, just now, on the argument as to the omission of the word "executors," in the Glasgow copartnership contract; but I note, in passing, that the words "heirs and successors," on which Lord Kingsdown relies, as assisting to put "insuperable difficulty" in the way of limiting the liability of the trustees, are equally employed in that contract in the same connection and for the same purpose as in the contract of the Western Bank.

The general grounds, therefore, of the decision in *Lumsden v. Buchanan* seem to me to be completely applicable to this case;—the character of the contract: the incompetency of the directors to limit liability in defiance of its

(') Court Session Cases, 3d Series, vol. ii, p. 695, and vol. iii (H.L.), p. 89; 4 Macq., 950.

(') 4 Macq., at p. 970.

377] terms and disregard of the relations *created by it: the legal impossibility of accepting fiduciary shareholders as a separate class, and the clear and unequivocal words of the covenant, stipulating for no exemption, as they forego no right.

If this be so as to the general grounds of decision, is there anything in the particular differences which have been suggested between the deeds to relieve us from the necessity of following the authority of *Lumsden v. Buchanan* (').

It has been argued, that there is such a difference because, in this case, the appellants are described as trustees in the body of the deed, and so registered, whilst in *Lumsden v. Buchanan* (') the fiduciary character appeared only in the testing clause. But that clause was clearly embodied, by reference, in the deed, and was dealt with as being so embodied in the judgments of the noble and learned Lords. In this matter, therefore, for the purpose of decision, the difference is immaterial.

Then, it was said that the introduction of the word "as" in the transfer deed of the Glasgow Bank before "trust disponees," which is not found, in the testing clause in *Lumsden v. Buchanan* ('), demonstrates that the appellants qualified their liability and entitled themselves to say that they are only answerable to the extent of the trust estate. There seemed some plausibility in the argument representing "trustees" as a mere word of description, and insisting that "*as* trust disponees" marked the character in which alone the transfer was accepted. And the case of *Gordon v. Campbell* (') undoubtedly shows that, under certain circumstances, a trustee may, by apt words, limit his liability. The words in that case were held by this House to be sufficient for the purpose. But, there, the parties being free to enter into such a contract, their intention to do so was put beyond all question by the phrase "*qua* trustees only," and proper effect was given to it. That case, therefore, scarcely applies where the directors of a bank are incompetent to make a contract of the kind—where the nature of the dealing does not admit of it—and where, as in *Lumsden v. Buchanan*, a fair interpretation, in another sense, may be put upon the words, reconciling them, as I have said, with the 378] duty of *the directors and the rights of the shareholders. But the decisive answer seems to be, that the whole reasoning of the noble and learned Lords proceeded

(') Court Session Cases, 3d Series, vol. ii, p. 695, and vol. iii (H.L.), p. 89; 4 Macq., 950.

(*) 1 Bell's App., 428.

on the assumption that the trustees had dealt with the Western Bank only in that character, and that the *ratio decidendi* and the decision itself would have been exactly the same if, in the testing clause, the word "as" had been employed. This difference, also, appears to me insufficient to diminish the coercive force of the authority.

It was further argued, that another distinction arises because the appellants were not original allottees of stock, and did not personally enter into an undertaking which might have bound them in that character. But I fail to appreciate the value of the point. The original allottees took the shares without limit of liability. The other shareholders and the creditors of the bank, therefore, acquired certain rights to be exercised in certain contingencies; and can those rights be destroyed merely because the appellants are transferees, having accepted the transfer expressly "subject to all the articles and regulations of the company," in the same manner as if they had subscribed the contract? According to the doctrine of *Lumsden v. Buchanan* (¹), in which the appellants had signed a deed of accession, adopting the contract of the Western Bank, whilst here they accepted a transfer equally binding them to the terms of the contract of the City of Glasgow Bank, the directors had no power to treat trustees as a separate class with special responsibility; and had they made a transfer, it seems impossible to hold that those deriving under them could have been dealt with on a different principle. The directors were incompetent to deal with them on any other. There seems to be, therefore, no material distinction between the cases for the purpose of the argument, in the diverse mode by which the shares were acquired in each.

Then, it was strongly urged that the use of the words "heirs, executors, and successors" in the deed of the Western Bank implied personal liability in the trustees. And, unquestionably, Lord Kingsdown placed reliance on those words, although, as I have already said, he omitted from them, in his citation, the word "executors," [379 and thus reduced them to the expression "their heirs and successors," which occur and have equal force in the last clause of the contract of copartnership of the Glasgow Bank, declaring that "the parties thereto, and their heirs and successors, shall be bound and obliged to observe and perform their respective parts of the present contract." So that, in the view of Lord Kingsdown, the terms of the deed before

(¹) Court Session Cases, 3d Series, vol. ii, p. 695, and vol. iii (H.L.), p. 89; 4 Macq., 950.

us would equally have imported personal responsibility with those which he thought important in the deed of the Western Bank. Besides, the absence of the word "executors" could have no differential effect, which is not removed by the presence of the word "heirs" and the interpretation given to it by the Scotch law, as connected equally with the devolution of personal and real estate, even if an undertaking to be bound might not be conclusively given without the use of the one word or the other. On this point, also, the argument has failed to satisfy me that any real distinction exists between the cases.

My Lords, I have adverted to the particular instances in which it has been sought to establish differences between *Lumsden v. Buchanan* ⁽¹⁾ and the case of the appellants, and, certainly, with no indisposition to recognize such differences if they could be shown to exist, and after very grave and careful consideration, I find myself unable to discover a real distinction between them, and I think, with the judges of the Court of Session, that the decision in the former case is absolutely binding in the latter.

We were pressed to regard the law and practice of Scotland as distinct from those of England, especially with reference to the position of trustees as clothed with something of a corporate character, by the former, which is admittedly unknown to the latter; and, undoubtedly, if a Scottish trust constituted a trustee or a number of trustees as a corporation, that would have relieved the individuals composing it from liability in their separate persons and imposed it on the body. But I have not discovered authority for such a position, whilst there seems to be very high authority the other way.

Arguments were also founded upon the registration and 380] incorporation* of the City of Glasgow Bank under the Act of 1862, as distinguishing its position from that of the Western Bank. Those arguments appear to have been elaborately urged in the courts below, but were not much relied on before your Lordships; and I think it enough to refer to the very able refutation which was applied to them in the judgments of the Lord President and Lord Shand in the Court of Session ⁽²⁾. The Joint Stock Acts of 1856 and 1862 operated certain changes; but there were no such changes with reference to the entry of notices of trust upon

⁽¹⁾ Court Session Cases, 3d Series, vol. ii, p. 695, and vol. iii (H.L.), p. 89; 4 Macq., 950.

⁽²⁾ Scottish Law Reporter, vol. xvi, pp. 147, 153; Court Sess. Cas., 4th Series, vi, pp. 398, 410.

the registers of companies, or as to the character of the obligations undertaken by a shareholder, and properly ascertained or ascertainable from the contract of copartnership.

I have adverted, I think, to all the material points which have been raised in the course of the able and elaborate arguments of the learned counsel for the appellants; and on the whole, whilst I participate fully in the painful sympathy which has been expressed by my noble and learned friend on the woolsack, I am obliged to concur with his conclusion that there is no distinction between this case and *Lumsden v. Buchanan* (¹), and therefore that the judgment of the Court of Session should be affirmed, and the appeal dismissed.

LORD SELBORNE: My Lords, by the 5th, 6th, 33d, 38th, 40th, and last clauses of the copartnership deed of the City of Glasgow Bank it is in effect provided, that every person who is at any time admitted as a partner shall be absolutely and without limit liable for all the debts and engagements of the company; and that all the partners shall be equally liable *inter se*, in proportion to their respective shares.

It is consistent with this that a plurality of persons may be (as is contemplated by the 13th and 14th clauses), co-proprietors of the same shares. The *aliquot* part of the common burden cast by the partnership contract upon those shares is exactly the same whether they are held by one or more than one person. If by *more than one, every [381 one of the co-proprietors is bound to the company for the whole proportionate liability attaching to those shares, neither more nor less, and they, among themselves, are *prima facie* bound to contribute equally to that liability. In this there is nothing extraordinary, nothing unjust. Whether they undertake the obligations of partners for their own benefit, or for the benefit of others, it is a question for themselves and not for the company.

By the 40th clause it is provided that those who stand registered as shareholders in the stock ledger of the company are, for all purposes of liability on the one hand and of participation in profits on the other, to be regarded as "the proprietors" of the shares. The effect of this provision, when considered in connection with the absence in this deed, and in the relative statute law, of anything to prevent the company from taking notice of trusts, is, that, although any partner who holds his shares in a fiduciary capacity will (of course) be bound to apply and account for

(¹) Court Session Cases, 3d Series, vol. ii, p. 695, and vol. iii (H.L.), p. 89; 4 Macq., 950.

any share of profits to which he may be entitled according to his trust, the company is entitled and is bound to look to him, and to him only, as having for all partnership purposes the sole title to the shares, both as to profit and as to liability, and he must be taken to have known and understood this when he accepted them.

Corporations (including, of course, incorporated companies, and therefore all companies formed with limited liability under the act of 1862), might, under clause 40, be members of this copartnership, and, being legal persons, they would be subject, in respect of any shares which they might hold, to precisely the same equal and unlimited liability with individual shareholders—every one of them being liable to the full extent of his whole means and estate. In the one case, the whole property of the individual, in the other the whole property of the corporation, would be answerable to the creditors, and (in contribution) to the copartners of the bank.

If, by the law of Scotland, every trustee or body of trustees, acting in that character, were a corporation, and the trust estate corporate property, the appellants in this case would be right. There would, on that hypothesis, be no need to show that there was any special or exceptional [382] contract between the appellants *and the copartnership. The corporation would be liable and not the individual corporators. But no authority has been produced showing this to be the law of Scotland; and it appears to me (postponing for the present all consideration of the effect of the decision in *Lumsden v. Buchanan* ⁽¹⁾), to be at variance with the case of *Martin v. Wight* ⁽²⁾. There Lord Mackenzie said, "A trust, with a power of assumption, does not establish a corporation; I do not think that a private trust is to be considered as of the nature of a corporation." And Lord Fullerton, "The case is different from a corporation, which is held to be one person;" "A trust for purposes does not create a separate constructive person like a corporation; the title of each trustee stands on the right made up in his own person." These observations related, indeed, to the mode of making up titles to heritable property held in trust when new trustees had been assumed, but the principle could not be limited to that case. If authority had been wanting, reason would lead to the same result. Corporations, properly so called, are public bodies created for definite purposes

⁽¹⁾ Court Session Cases, 3d Series, vol. ii, p. 695, and vol. iii (H.L.), p. 89; 4 Macq., 950.

⁽²⁾ Court Sess. Cas., 2d Series, vol. ii, p. 485.

by royal charter or by public law ; and this is equally true of quasi-corporations, or bodies having some, but not all, of the incidents of corporations. But, if the constitution of any private trust could in law have a similar effect, every individual would be able, for purposes and upon conditions of his own choice, without any restraint or regulation by public law, to invest himself or others with a corporate character, and so to limit and subdivide, by mere operation of law, what would otherwise be the effect of his and their engagements.

In *Lumsden v. Buchanan* ⁽¹⁾ the respondents were five persons, individually named and described in the testing clause of the deed, with this designation superadded to their personal names and descriptions: "Trustees for Mrs. Helen Brown, the majority surviving being a quorum." That designation, though occurring in the testing clause, was incorporated, by words of reference, into the inductive and operative parts of the deed. It could mean nothing less than that the title and interest of these five persons to and *in the shares for which they subscribed was fidu- [383 ciary, and not beneficial ; and that, in this sense, at all events, they subscribed "*as trustees*." If, by the general law of Scotland, they were a corporation or quasi-corporation (it was admitted at the bar that trustees cannot sue or be sued under any collective designation without using their own individual and personal names) I can imagine no ground on which it could possibly be held that they did not subscribe that deed in their corporate character. But the decision of this House was that they were all individually and personally liable.

To my mind, the present case depends upon this single point. But I think it right also to consider another and less technical way by which it has been sought to reach, practically, the same conclusion. The inequality which would be produced by allowing trustees to be accepted or assumed as partners upon the footing that the whole trust property, and that only, should be liable, is said to be apparent only, and not real ; because the copartnership and its creditors can never, in any case, get more from any partner than the whole of his property available for the payment of his debts, which property must in all cases have some limit, less or more according to circumstances, of which the other partners may know nothing, and must take their chance, and in some cases, may really be worth nothing at all ; and it is

⁽¹⁾ Court Session Cases, 3d Series, vol. ii, p. 695, and vol. iii (H.L.), p. 89 ; 4 Macq., 950.

contended, that, if they get the liability of the whole property subject to a particular trust, they get what is as good as, and may perhaps be better than, the liability of individuals. On these grounds, it has been contended, that it was open to the directors of the City of Glasgow Bank to accept the appellants as partners on those special terms; and that they, in fact, did so.

The principle of this argument, when applied to such a copartnership as the City of Glasgow Bank, seems to me altogether fallacious, however common a practice it may be in Scotland for simple money obligations, and other ordinary contracts, to be made between trustees and other persons competent to contract in any manner which they think fit, upon the footing that the trust estate only is to be held liable.

A contract of the kind supposed would really be for limited liability, though of an anomalous nature; the limit [384] being undefined *as to amount, variable in different cases, and subject in many conceivable cases to various doubts and questions. By the Joint Stock Companies Act, 1862, provision is made for limited liability in either of two ways, one of which is called liability limited by guarantee. This consists in an engagement by each shareholder to contribute towards the payment of the debts and engagements of the company, in case of its being wound up, a sum of money not exceeding a certain specified amount. The City of Glasgow Bank was not a company limited by guarantee or otherwise. If any individual shareholder had proposed to the directors to take an allotment of shares upon the condition that he should in no case be liable beyond a certain specified amount (in other words, that he should be a shareholder limited by guarantee), it is clear that the directors would have had no power under this deed to agree to such a condition, whether accompanied or not by a pledge in security of any particular fund or property. *A fortiori*, such a condition could not be annexed to a transfer of shares, originally issued and held by the transferor upon the ordinary terms of unlimited liability.

The effect of the appellants' contention practically is, that on the occasion of the transfer to them of the shares registered in their names, something equivalent to this was done, though without specifying the amount of the trust funds constituting the assumed limit of their liability. It is stated in the present case there were trust funds beyond the limits of themselves, of large amount. But the principle of the argument, when taken in connection with the terms of

this copartnership deed, goes much further. If sound, it would enable a trustee-shareholder, when no other property was in trust, to become a partner without any personal liability at all, and also without any liability of any property or fund beyond the shares themselves. There is nothing in this deed to prevent any purchaser of shares in the market from causing them to be transferred into the name of a trustee declared to be such on the face of the transfer, who, according to this view, would be under no personal liability, and therefore would have no occasion for, or right to, any indemnity against the beneficiaries or against the author of the trust; and the purchaser himself, having never become a partner, would also be free from all liability. *Nor [385 would such a transaction (at all events if it took place when the bank was a going concern and in good credit) be impeachable for fraud.

This copartnership deed does not anywhere contemplate that shares once issued can undergo any alteration in their character or incidents by reason of any subsequent transfer. No authority is given to the directors to impose or accept any special terms, upon the accession of any transferee to the contract. They have power under clause 34, in the case of a gratuitous transfer, to require the shares to be sold in the market, and in the case of a transfer for value to purchase them at the price proposed to be given, if they think fit to do so. Unless they exercise this power, they cannot intercept the right of transfer, or object to receive any transferee, on the ground that he is a mere trustee, or for any other reason arising out of his relations to the transferor or any other person—relations into which, so far as I can see, he is not bound to recognize their right even to inquire. All that they can do is to regulate, under clause 37, the form of the transfer. The effect of the transfer, when made, is treated by the deed as the same in all cases. Under clause 6, the transferee (when registered) becomes “entitled to all the rights and subject to all the liabilities of an original partner of the company;” and under clause 38 he is to “take the precise place of his author.”

When then, under these circumstances, is the effect of the introduction of the word “as” before “trust disponees” in the transfer deed, by which the appellants in this case expressly agreed to become “in terms of the contract of copartnership of the said bank, subject to all the articles and regulations of the said company, in the same manner as if they had subscribed the said contract?” This word “as” (twice used) constitutes the sole difference which can

possibly be represented as substantial between the present case and *Lumsden v. Buchanan* ⁽¹⁾; the omission of the word "executors" in the obligation undertaken at the end of this partnership deed by "the parties thereto and their heirs and successors" being certainly immaterial. It is urged that the necessary import of a contract in Scotland "as trustees" 386] *is to exclude unlimited personal liability; and that, if that could not be done, the transfer, and consequent registration, did not impose upon these trustees a liability to which they had never consented, but must wholly fall to the ground. Whether, if the premiss were correct, this conclusion would follow, it is unnecessary to inquire, because I think that the premiss is not correct. The authorities cited at the bar (*Gordon v. Campbell* ⁽²⁾ and *Thomson v. M' Lachlan's Trustees* ⁽³⁾) show that there is no fixed rule in Scotland as to the effect of such words, but that it must always depend upon the context and upon the nature and circumstances of the contract in which they occur. If they are open to either of two constructions, the one consistent with the context and with the substance of the contract, the other repugnant to and destructive of it, the former ought, certainly, to prevail. Applying that test, it appears to me that in this deed of transfer the words "as trust disponees" not only may mean, but do mean, the same thing which was meant by the designation of trustees (though without the word "as") in *Lumsden v. Buchanan* ⁽¹⁾; and therefore that the Court of Session was right in holding the position of the present appellants to be undistinguishable from that of the respondents in *Lumsden v. Buchanan* ⁽¹⁾, and to be governed by your Lordships' decision in that case.

It is hardly necessary for me to add that I concur, to the fullest extent, in the expression given by my noble and learned friend on the woolsack to the sympathy, which all your Lordships must feel, for the sufferers in this most painful case.

LORD BLACKBURN: My Lords, in an ordinary case I should have contented myself with expressing a general agreement with the reasons given by the noble and learned Lords who have already spoken, but the amount at stake and the hardship on the appellants is so great that I think it right to give my own reasons.

The facts on which the question arises are few, and may be briefly stated. The contract of copartnership of the City of

⁽¹⁾ Court Session Cases, 3d Series, vol. ii, p. 695, and vol. iii (H.L.), p. 89; 4 Macq., 950.

⁽²⁾ 1 Bell's App., 428.

⁽³⁾ 24 June, 1829; 7 S., 787.

*Glasgow Bank was originally framed in 1839. The [387 6th article provides that "any person becoming the holder of a share shall have all the rights and be subject to all the liabilities of an original partner." The shares have since been converted into stock, and this article now applies to holders of stock. By the last article (No. 54), "The parties hereto and their heirs and successors shall be bound and obliged to observe and perform their respective parts of the present contract." It seems to me quite clear, and I think was not disputed, that those who took shares or stock and acceded without qualification to this contract became personally liable to fulfil the terms of it as much as the original subscribers. But the appellants contend that they did not accede without qualification, and it is necessary to inquire how they acceded.

By a deed of transfer, dated the 27th of January, 1874, the then holders of £6,000 stock transferred and made over to William Muir and three others named "the trust disponees," in a deed described, "their successors and assigns," £6,000 stock in the City of Glasgow Bank, the said William Muir and others named "*as trust disponees* foreshaid by acceptance hereof being in terms of the contract of copartnership of the said bank subject to all the articles and regulations of the said company in the same manner as if they had subscribed the said contract. And we, the said William Muir, &c., *as trust disponees* foreshaid, do hereby accept of the said transfer on the terms and conditions above mentioned;" and this is subscribed by the four persons in their own names. And there was an entry made in the stock ledger of the company, "William Muir" and the three others "*as trust disponees*."

I do not think that there is any other fact affecting the question before the House.

It appears, therefore, that these four gentlemen are in the same position as if they had with their own names subscribed the contract of copartnership, but stated on the face of the instrument that they were trust disponees, and that the stock was conveyed to them, the trust disponees, and their successors and assigns; and that they as such trust disponees accepted the stock; and as if the bank, knowing all this, entered their names as trust disponees. And the question raised I take to be whether these statements do *so [388 qualify the contract into which they entered as to make them not bind themselves, their heirs and successors, personally, as would have been the case if they had subscribed the contract without any qualification.

Before the decision of this House in *Lumsden v. Buchanan* ⁽¹⁾ in 1865, the question was one on which much difference of opinion prevailed; but nine years before the parties executed this transfer that decision of this House, so far as it extended, settled the law. I have carefully considered the judgments in that case, and I think this much at least must be considered as decided and settled, viz., that trustees (not created by a statute) are not by the law of Scotland a body corporate, or, as it has been loosely said, a *quasi*-corporation. I have myself no doubt that if individuals enter into a contract because they are trustees, and for the benefit of the trust, it would be prudent in them to stipulate that, though they bind themselves to see that the trust funds are properly applied to fulfil that contract, their contract shall extend no further, and that they will not be personally liable to make good the deficiency, if any; and if they express such a limitation with sufficient clearness, and the other contracting party (being *sui juris*) accepts such a limited engagement, he cannot call on the trustees to do more than to fulfil that limited engagement. There was an opinion entertained by many Scotch lawyers, and to some extent countenanced by the decision in this House of *Gordon v. Campbell* ⁽²⁾, that by the law of Scotland a mere statement on the face of the contract that the contractors were trustees, and entered into the contract because they were trustees, was, as a matter of law, enough to express that the engagement was of this limited kind. I do not (speaking for myself) doubt that it is an important element to be taken into consideration in construing the contract, but I think the decision of *Lumsden v. Buchanan* ⁽¹⁾ determines that it is not by itself enough to give any contract this limited effect, and certainly that it is not enough to do so when the contract is a contract of copartnership, the nature of which would make such a limited engagement to say the least very inconvenient. If the matter were *res integra* I think I [389] should have come to the *same conclusion, for the statement that the parties are trustees is not thereby made an idle or inoperative statement. It marks, as has been pointed out, that the property in the shares is trust property, which it is true is for the convenience of the trust only; but it also informs the bank that the property belongs to trustees, and will consequently in case of death vest by survivorship, and it is for the benefit of both parties that this

⁽¹⁾ Court Session Cases, 3d Series, vol. ii, p. 695, and vol. iii (H.L.), p. 89; 4 Macq., 950.

⁽²⁾ 1 Bell's App., 428.

should be known from the beginning. But even if it were an idle or inoperative statement, I do not think it a sound rule of construction that some effect must be found for every word, even if that can only be done by giving it a force beyond what it can reasonably bear. But I do not rest my judgment on this. I act on the ground that the decision in *Lumsden v. Buchanan* (') is binding as far as it goes. And I see what I think good reasons for acting on it strictly in this and the other cases arising out of the stoppage of this bank. I think that the main object of the parties in the present case was that the shares should vest in the four gentlemen, and it is at the least very doubtful whether, if the contract was understood as the appellants contend, that object would not be frustrated. Now, as a general rule of construction, ambiguous expressions in a contract should not be construed in a sense that would frustrate the main object of the contract; they should be construed *ut res magis valeat*. And if the trustees meant to limit their liability, it was for them to see that the words were sufficient to make that clear. Ambiguous words should be construed *fortius contra proferentem*. And for both reasons it seems to me to rest on any one, who after 1865 became or continued a shareholder, to show that there is some substantial difference between the terms of his accession to the contract and the terms of that which in 1865 had been determined not to restrict the liability of the trustees. Now, as far as I can see, there is scarcely any difference in form, and none at all in substance, between the two. The contract of copartnership of the Western Bank began by saying that the parties bound themselves, their heirs, executors, and successors. That of the City of Glasgow Bank ends by declaring that they bind themselves, their heirs and successors. Does the omission of the word "executors" *make any difference? I [390 cannot think that it does; and it is perhaps worth noticing that Lord Kingsdown quotes the words of the contract in the Western Bank case (inaccurately it is true) as being that they bound themselves, their heirs and successors, showing that he did not think the word "executors" was material.

The parties in *Lumsden v. Buchanan* (') acceded to the contract by subscribing a contract (set out in the printed papers laid before the House in that case at p. 255). That deed of accession narrated that the directors had created new shares, and allocated them to a large number of persons

(') Court Session Cases, 3d Series, vol. ii, p. 695, and vol. iii (H.L.), p. 89; 4 Macq., 950.

designated in the testing clause. The designations were differently worded, I presume, according to the words in which the applications for shares were expressed. The designation of the appellants in *Lumsden v. Buchanan* was "trustees for Mrs. Ellen Brown, the majority surviving being a quorum." That in the present case is "as trust disponents." Can that make any difference? I think not.

I therefore agree in the motion of the noble and learned Lord on the woolsack, that this appeal should be dismissed with costs.

LORD GORDON, although not present during the argument of the case, stated his full concurrence in the conclusion arrived at by their Lordships.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 7th April, 1879.

Agent for appellants: *William Robertson.*

Agents for respondents: *Martin & Leslie.*

See 30 Eng. Rep., 665 note; 42 Am. Dec., 378 note; 16 Cent. L. J., 342.

An agent may pledge his own liability, and in such case the promise is founded upon a sufficient consideration, and the agent is personally liable. A pledge or promise so made is not an obligation to pay the debt of another, but an obligation which the agent assumed for a consideration, and it is not within the statute of frauds: *Sayer v. Edwards*, 19 W. Va., 352.

The addition of the title "Director" after the name of a person signing a promissory note will not relieve him from personal responsibility on his contract: *Amer. Ins. Co. v. Stratton*, 13 N. W. Repr., 763, probably to appear in 79 Iowa; *Scanlan v. Keith*, 102 Ills., 634.

A promissory note in the usual form, "We promise to pay," etc., given for an indebtedness of a corporation and signed by the trustees thereof thus: "G. W., I. B., G. W. F., Trustees Perry Lodge 37, F. and A. M.," is the note of the persons whose names are appended, and parol evidence is not admissible to show that the parties intended and supposed it to be the note of the lodge and agreed that such should be its effect: *Williams v. Second Nat.*, etc., 83 Ind., 237.

A contract containing the words.

"We promise to pay," and signed by two persons, describing themselves respectively as "President School Board," and "Secretary School Board," but which contained no reference to any school district; held to be the personal obligation of the signers, who could not show by parol evidence that such was not in fact the intention: *Wing v. Glick*, 56 Iowa, 473.

The character of the liability of the drawer of a bill of exchange must be determined from the instrument itself, and the addition of the word "agent" to his name without anything else on the instrument indicating his principal, does not relieve him from personal liability as drawer of the bill: *National, etc., v. Cook*, 3 Ohio L. J., 304, 38 Ohio St. R.

Where a loan is negotiated by the treasurer of a company, and he gives for the money promissory notes which do not purport to be given by the company, and signs the notes with his own name, adding the word "Treasurer," that term is merely *descriptio personæ*; and if other directors with the treasurer indorse or guarantee the notes, they are personally liable, and the company is not.

An exchange of such notes for another, and confession of judgment on the last by the treasurer, without au-

thority from the company, is void : *Medbury v. Short*, 15 N. Y. Weekly Dig., 227.

An administrator who signs a note, describing himself as administrator, becomes personally liable, unless he expressly stipulates to pay out of the estate only: *Studebaker v. Montgomery*, 74 Mo., 101.

Defendant took a lease from plaintiffs, purporting to be a corporation, and executed it "for the board of trustees," as treasurer. It appeared that there was no such corporation. Held, that defendant was personally liable on the lease: *Bartholomew v. Kaufman*, 16 N. Y. Weekly Dig., 127, Ct. Appeals.

A bill of exchange was directed to A., purser of B. company, and accepted by him thus: "A., per procuracy of B. company." A. was a shareholder in the company, which was not incorporated. Held, that A. was liable on the bill: *Nicholls v. Diamond*, 2 Com. L., 305.

Defendants sent for plaintiff: stated that they belonged to a Masonic Lodge which had been burned: that they were acting as a building committee for the lodge, and wished plans made for a new one. There was no proof that the lodge was incorporated or that this building committee had been duly authorized to employ plaintiff. Plaintiff recovered against defendants personally.

Held, no error: *Bentley v. Merriam*, 16 N. Y. Weekly Dig., 59, mem. 28 Hun, 444.

As to what is sufficient evidence of the existence of a corporation in fact: *Scanlan v. Keith*, 102 Ill., 634; *Studebaker v. Montgomery*, 74 Ind., 101.

In an action upon a note reading as follows: "For value rec'd as treasurer of the town of Monmouth, I promise to pay D. M. Ross, or order, one hundred and sixty dollars in one year from date, with interest. Wm. G. Brown, treasurer," it was not shown or claimed that the treasurer was authorized or had the permission of the town in its corporate capacity to issue the note in its behalf. Held, that the note must be regarded as the note of Brown, and not the note of the town: *Ross v. Brown*, 74 Me., 352.

The complaint herein alleged that W., by written instrument, under seal, agreed to sell and convey to plaintiff, and the latter agreed to purchase, cer-

tain premises, and a specific performance was asked for. A copy of the contract was set forth in the complaint. It was between W., of the first part and F., "president," of the second part. By it "the said party of the first part" agreed to sell and convey the premises to "the said party of the second part," and the latter agreed to pay the purchase price, a portion cash, and the balance "to be secured by a bond and mortgage upon the property * * * on condition that the Buffalo Catholic Institute will accept and approve this purchase and its terms." The contract was signed by F., with the addition to his name of the words, "president of Buffalo Catholic Institute." The complaint alleged tender of performance by plaintiff and refusal by W. On demurrer to the complaint, held that the contract set forth was the contract of F., not of the plaintiff; that the averment that W. agreed to sell and plaintiff to purchase was simply one as to the legal effect of the instrument set forth, and was not admitted by the demurrer; and that, in the absence of averments, that F. was plaintiff's president or agent, and made the contract as such, the demurrer was properly sustained.

As to whether the contract could be helped by such averment, so as to entitle plaintiff to a specific performance, *quare*: *Institute v. Better*, 87 N. Y., 250.

Where a person acts merely as agent of another and as such signs papers, an express disclosure of his principal's name on their face or in the signature is not essential to protect him from personal liability to a party having full knowledge of the facts: *Metcalf v. Williams*, 104 U. S., 93, 4 Morr. Tr., 148; *Scanlan v. Keith*, 102 Ill., 634.

A party is an agent or principal, in accordance with the intention of the parties to the instrument. An agent contracting as such, is liable only where he agrees to become responsible for his principal, or where he has been guilty of fraud.

Where one signs an unsealed instrument without any qualification, the court will look at the whole instrument to arrive at the intention of the contracting parties; and if it be seen that the undertaking is in behalf of another, and that there is no purpose

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to bind the party signing, personally, the form of the signature will not be regarded nor will he be liable: *Fowle v. Kerchner*, 87 N. C., 49.

As a general rule, it is quite well settled that one will be held *personally* liable on a covenant made by him *as trustee*. The additional word "trustee" in such cases is construed merely as a word of description, showing the capacity in which the covenantor acted. It is equally clear, on the other hand, that, although one may covenant as trustee, he may limit and qualify the character in which he is to be held answerable, and where it plainly appears from the face of the instrument that he did not mean to bind himself personally. Courts will construe the covenant according to the plainly expressed intention of the parties; and this, too, in cases where the covenantor had no right to bind himself in a fiduciary character.

A suit was brought on a covenant in a mortgage made by J. G., trustee of M. A. The mortgage recited that "whereas the said J. G. appointed by deed from said M. A., dated," etc., "and duly recorded," etc., "has, by virtue of the provisions contained in said deed, obtained from F. C. B. a loan of two thousand dollars, and the said action of the trustee having been confirmed and ratified by order of the Circuit Court of Baltimore City," etc. etc. Then followed a description of the mortgaged premises, and a covenant on the part of J. G., trustee, to pay the mortgage debt.

Held, 1. That if the question depended solely on the covenant itself, there could be no question as to J. G.'s personal liability.

2. But when the covenant is read in connection with the recitals in the mortgage which refer to the deed of trust, by which he was authorized to borrow the money, and the order of the court having jurisdiction over the trust property, and to whom the trustee was answerable for its proper administration, it was clear that J. G. neither meant to make himself personally liable, nor was it so understood by the mortgagee: *Glenn v. Allison*, 58 Md., 527.

The directors of the Howard County Agricultural Association gave a note in which were the words "on," etc.,

"The Howard County Agricultural Association who execute this note by her directors do promise to pay," etc., signed "T. M. K. secretary," and others followed by the words "Directors Howard County Agricultural Association": Held, in an action thereon, that the note was that of the association and not of the individuals whose names are signed thereto: *Armstrong v. Kirkpatrick*, 79 Ind., 527.

A written agreement purporting to be between T., agent of the steamship A., of the one part, and G. of the other part, and signed by "T., agent," and G., provided that the party of the first part let to the party of the second part a certain space on the steamship for the conveyance of cattle; that the steamship should put on board a condenser capable of supplying the cattle with water, and the captain was to allow his officers and crew to render assistance in case of emergency, without liability to the shipowner; that the attendants of the cattle were to have passages free of charge, but without liability to the shipowner; and that the steamship was to have a lien on the cattle for the freight. Held, that the agreement was the contract of the steamship and her owners and not of T. personally: *Goodenough v. Thayer*, 132 Mass., 152.

A party will not be permitted to show by oral testimony that his written agreement understandingly entered into, was not in fact to be binding on him. So it has been held, where trustees of a church corporation made a note in their individual names, although they described themselves as trustees of the church, parol evidence was inadmissible to show it was the intention of the parties that it was to be the note of the church corporation, and not that of the trustees executing it,—the principle being that such instruments will be construed as the parties made them, without the aid of extrinsic evidence. But there is another principle, that where a person signs his name as cashier or agent for a banking, railroad or other corporation, in drawing drafts and bills, or in accepting drafts or other evidences of indebtedness, in its ordinary business, if it appears or is made to appear it is the obligation of the company, and the cashier or agent or other officer had

authority to bind the corporation, he is not personally liable. And the facts—collateral though they may sometimes be—may be shown by extrinsic evidence, in order that it may appear whose obligation it is: *Scanlan v. Keith*, 102 Ill., 634.

A bishop is not liable for the salary of a priest whom he has engaged: they are fellow servants of the church, for which the bishop acts merely as a superior agent and not as a principal: *Rose v. Verten*, 46 Mich., 457.

The trustees of a public institution, who are charged by statute with its general supervision and required to perform all acts necessary to render it efficient, are not personally liable in damages for the cancellation of a contract of employment made by them, and a refusal to allow the employe to enter upon his duties thereunder, though such action upon their part is wrongful, unjust and illegal: *Chamberlain v. Clayton*, 56 Iowa, 331.

A sheriff may procure the articles he is required by statute to furnish for the use of prisoners in his custody on the credit of the county, and the person furnishing the same may maintain an action directly against the county for the purchase price. One so furnishing supplies for prisoners is bound to know that the articles supplied are suitable for the purpose, and possibly that they are necessary, but is not required to determine beyond that whether or not the sheriff has properly exercised the discretion vested in him by the statute: *Feldenheimer v. County of Woodbury*, 56 Iowa, 379.

In an action for the purchase price of hay delivered by plaintiff to one M., plaintiff's evidence tended to show that the hay was purchased by defendant, and that the latter did not disclose the fact that he was acting as agent for another; and defendant's evidence tended to show that he acted merely as bearer of messages to plaintiff from M. or S., or one of them, concerning the purchase, and that his relation to the transaction was fully disclosed to plaintiff. Held, that it was error to instruct the jury that "if defendant gave plaintiff a right to understand that he (defendant) was *making himself responsible* for the hay, and that plaintiff might look to him for the pay," then he was liable; the only question under the

evidence being whether defendant purchased the hay without disclosing his principal: *West v. Wells*, 54 Wisc., 525.

A deed executed under a letter of attorney reads (so far as material here) as follows: "This indenture made * * * between James O'Gill * * * by my attorney in fact, Robert Whiteacre, party of the first part * * * witnesseth, that the said party of the first part * * * have granted * * * and do by these presents grant, bargain, sell and convey * * *. In testimony, the said party of the first part, by his attorney aforesaid, hath hereunto set his hand and seal, the day and year first above written.

Robert Whiteacre, [seal]
Attorney in fact for James O'Gill."
Held, that the instrument is the deed of Gill: *Begelow v. Livingston*, 23 Minn., 57.

Where a reward was offered by a board of supervisors without authority, and acted upon by the plaintiffs, all parties supposing the board had such authority, the fact that they had, in law, no authority, does not make them personally liable: *Hutchings v. Bousquet*, 2 McCrary, 152.

When a contract is made by an instrument, under seal, on technical grounds, no one but a party thereto is liable to be sued upon it; and therefore, if made by an agent or attorney, it must be made in the name of the principal, in order that he may be a party, because otherwise he is not bound by it: *Williams v. Gillies*, 28 Hun, 175, 177.

Where one sells goods to another without disclosing his agency, and the purchaser has no knowledge that the seller is not the owner of the goods, the purchaser may, in an action by the principal for the purchase-money, set off a demand due him from such agent: 41 Amer. Dec., 46 note; 29 Eng. Rep., 192 note; 80 Id., 667 note.

A. was employed by B. as agent to sell his grain drills; he succeeded in making sales of upwards of twenty, but B. only delivered five: Held, in a suit by B. against A., for the value of the five drills delivered to him, that he, A., could set off the value of his services in making the sales of the drills that were not delivered: *Johnson v. Hoosier Drill Co.*, 39 Leg. Int., 403,

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An action upon a covenant in a deed on the part of the grantee, by which he assumes an incumbrance, cannot be maintained against a third person upon proof outside of the instrument that the grantee was in fact acting as agent and dealing for such a third person.

So, also, the alleged principal cannot be made liable upon proof *aliunde*, for a deficiency arising upon a foreclosure of a mortgage given by the grantee for a portion of the purchase-money.

Plaintiff entered into a contract in writing, under seal, with one McN., who was described in the instrument as agent of S. for the sale by the former to McN., as such agent, of certain lands. McN. and S. transferred their interest in the contract to H., and it was fulfilled by a conveyance to H., who executed to plaintiff his bond and mortgage for a portion of the purchase-money. Plaintiff foreclosed the mortgage without making defendant a party to the foreclosure, and a personal judgment for a deficiency arising on sale was rendered against S., and a grantee from him who had assumed payment of the mortgage. This action was brought to recover said deficiency, on the ground that the vendees and assignees were simply agents of defendants: Held, that the action was not maintainable upon the original contract—first, because it was *inter partes*, and defendant could not be made liable up-

on its covenants; second, because it was completely executed and merged in the deed and mode of payment there adopted, and the remedy of plaintiff was confined to and measured by the securities that he took; and that, for the first reason, he was not liable under the mortgage.

It seems, that where an agent contracts for the purchase of property in his own name without disclosing his principal, and the contract is such as may be enforced against the principal when discovered, the vendor cannot enforce it against the principal when discovered; the vendor cannot enforce it against both principal and agent, but is put to his election, and having after such discovery brought an action and recovered judgment against the agent, he is estopped from charging the principal: Tuthill v. Wilson, 90 N. Y. 423.

Where the principal is concealed and the credit is given solely to the agent, and subsequently the principal is discovered, to create liability on the part of the principal, it must appear from the evidence that the agent at the time of the indebtedness was acting within the general scope of his authority as such agent, or that the act of the person acting as agent was in some manner, with a knowledge of the facts, ratified by the principal, or that the principal knowingly enjoyed the benefits of the transaction: Wider v. Branch, 12 Bradw., 358.

[4 Appeal Cases, 391.]

J.C.(*), May 15, 16, 17; June 14, 1879.

[PRIVY COUNCIL.]

***NATIONAL BANK OF AUSTRALASIA (Defendant), *Appellant*; and THE UNITED HAND-IN-HAND AND BAND OF HOPE COMPANY, Registered (Plaintiff), and LAKELAND (Defendant), *Respondents*.** [391]

CONSOLIDATED APPEALS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Mortgagor and Mortgagee—Decree for Redemption where Bill impeached the Mortgage and did not pray to redeem—Liability of Mortgagee in Possession—Costs—Registration—Victoria Transfer of Land Statute, s. 83 et seq.

Although a mortgagor is not entitled to a decree for redemption on a bill which impeaches the mortgage securities and contains no prayer for redemption; yet such rule does not apply where the issues disclosed by the pleadings are not merely mortgage or no mortgage, but whether the defendant by means of his acts subsequent to the impeached mortgage had ceased to be mortgagee and had become absolute owner, and also whether the mortgagee's advances on the footing of the mortgage had not been more than satisfied by his receipts, the bill praying for an account, and offering to allow to the mortgagee all just credits.

A purchase by a mortgagee of mortgaged property, sold either under the power of sale or in execution of a decree against the mortgagor company (obtained collusively between the mortgagee and the directors) does not operate to vest an absolute title in the mortgagee.

Where the mortgagor is a registered owner of leasehold estate in Victoria (under Transfer of Land Statute), and the mortgage is made and registered under sect. 83 and following sections, so that the only way in which the mortgagee can extinguish the rights of the mortgagor is by foreclosure under 31 Vict., No. 317, or sale under sects. 84, 85, and 87 of the Transfer of Land Statute; then whether a sale of such leasehold estate is made by the mortgagee under the statutory power of sale, or as absolute owner, no interest therein passes to the purchaser until registration: see ss. 42 and 87.

A mortgagee is accountable, not merely for his actual receipts whilst in possession of the mortgaged property, but also for whatever is received by *those to [392] whom he transfers possession under an arrangement inoperative to transfer title, and in derogation of the rights of the mortgagor.

A mortgagee in possession is not chargeable with interest on his receipts if, when he took possession, an arrear of interest was due to him, unless by setting up a title adverse to the mortgagor he has lost the immunities of an ordinary mortgagee.

A mortgagee is chargeable with the full value of the mortgaged property sold if, from want of due care and diligence, it has been sold at an under value.

A mortgagee who in a redemption suit sets up and fails to prove an absolute title to the mortgaged property, and is then found to have been, at the date of suit, overpaid as mortgagee, will not only not be allowed his costs of suit but may have costs given against him.

APPEALS from two orders of the Supreme Court of Victoria (May 3, 1877, and Sept. 30, 1878).

(*) *Present*:—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

The questions decided in these appeals are as to the right of the respondent company, under the circumstances stated in their Lordships' judgment, to impeach a sale made to the appellant bank, and to redeem their mortgage; and also as to the terms upon which such redemption should be allowed.

The material facts of the case out of which the suit arose are stated in the judgment of their Lordships. For reports of the proceedings in the courts below, see 2 Vict. L. R. Eq., 206; Ibid, vol. iii, 61; Ibid, vol. iv, 173.

On the 10th of May, 1876, the respondent company filed a bill in equity against the appellant and William Lakeland, which after mentioning the mortgages of the 23d of February and the 11th of March, 1873, more particularly described in their Lordships' judgment, contained allegations to the following effect:

(Par. 10.) That no money was advanced by the bank to the company on the execution of the mortgages; that the seal of the bank was attached to those securities collusively and without lawful authority, and that in fact they were securities for former advances only.

(Pars. 11 to 15.) That in July, 1874, the directors of the company without authority arranged with the bank for a sale by the sheriff of the property comprised in those securities under a *fi. fa.*; that a clerk of the solicitor of the bank, as indorsee of a promissory note of the company brought an action on the note against the company; that [393] the directors allowed judgment to be *obtained by default, and that the sheriff, with the concurrence or at the request of the directors acting in collusion with the bank sold the whole of the property (subject to the mortgages) to Mr. H. Cuthbert, the solicitor of the bank, who in fact purchased on behalf of the bank.

(Pars. 16 to 21.) That Cuthbert shortly afterwards sold his interest in the property to two directors of the respondent company, on behalf of a new company, formed and incorporated as the United Hand and Band Company (*Nov. Liability*), who took possession.

(Pars. 22 to 27.) That in February, 1875, the bank assumed to act in exercise of the powers of sale in their securities sold the property to Messrs. Davey Brothers; that the said Davey Brothers in fact purchased on behalf of the bank who went into possession and carried on mining operations but in a negligent manner; that in March, 1875, all the interest of the new company was sold under a *fi. fa.* to one John Hardy, who assigned all his interest to the bank.

(Par. 32.) That in August, 1875, the bank (as above mentioned) sold the property to the respondent Lakeland for £8,000, which the bill alleged to be considerably less than the value.

(Par. 36.) That at the time Lakeland purchased the property he had notice of the several matters thereinbefore set forth, and of the rights of the respondent company.

And the bill sought to set aside as fraudulent and void the purchase by the bank through Cuthbert, its solicitor, of the property in question, and all subsequent dealings therewith, and to have the same delivered to the respondent company, and to make the bank and the respondent Lakeland, or one of them, liable for all gold, or proceeds of gold received by them, or either of them, from the mine (charging the bank with wilful default) and also liable for loss by negligent working—subject to the allowance of all sums properly expended in working. The bill offered to allow to the appellant all just credits but contained no offer to redeem.

The appellant bank, on the 13th of July, 1876, filed an answer, and thereby stated that it advanced £10,000 to the plaintiff company on the 7th of February, 1873, on its agreement to secure that sum by mortgage, and a further sum of £3,000 on the 25th *of November, 1873, denied all [394 collusion with the directors of the plaintiff company, claimed to be absolutely entitled to the mortgaged property, and denied its liability to account.

The respondent, William Lakeland, on the 21st of July, 1876, filed his answer, and thereby raised substantially the same points as were raised by the appellant.

On the 6th of December, 1876, Mr. Justice Molesworth decreed: (1.) That the indentures of the 22d of February, 1873, and the 11th of March, 1873, should be regarded as good securities for the amount owing from the company to the bank; (2.) That the company was entitled to redeem the lease comprised in the mortgage of the 11th of March, 1873; (3.) That the sale by the sheriff to Cuthbert was void as against the company, and that the bank had no title under the sale as against the company to bar the equity of redemption; (4.) That the sale to Messrs. Davey Brothers was void as against the company; (5.) That the sale by the bank to Lakeland was unwarranted as against the company, but as between the company and Lakeland was valid as to the plant and machinery transferred thereby, but not as to the mining lease; (6.) That the bank should be deemed liable as mortgagees in possession from the 6th of August,

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1874, and should be charged with what, but for their wilful default, would have been the clear proceeds of gold raised from the property by the United Hand and Band Company (*No liability*), by the bank from the 10th of February, 1875; by Lakeland from the 10th of September, 1875; (7.) That the bank should also be charged with the diminution in value of the mining plant and machinery sold to Lakeland (8.) An account of what was due to the bank.

On the 3d of May, 1877, the full court ordered that the decree should be varied by striking out therefrom the 5th declaration, and inserting in lieu thereof a declaration that the sale to Lakeland by the bank was valid as to the plant and machinery transferred thereby, but not as to the mining lease; and also by striking out the 7th declaration, and inserting in lieu thereof a declaration that the bank in taking the said account shall be charged with what but for its wilful negligence and default would have been the clear proceeds of the sale of the plant and machinery; and also with interest on what but for such negligence and default would have been the clear proceeds of such sale; and also with interest upon what but for such negligence and default would have been the clear proceeds of the gold raised from the land.

In pursuance of this decree the Master in Equity reported on the 1st of June, 1878, that on the result of the accounts all principal money due or owing or accruing due to the bank, and all interest thereon, was on the 1st of November 1875, fully paid off and discharged; and that the bank was on the 31st of March, 1878, indebted to the company in the sum of, £5,269 6s. 10d. for principal sums and interest up to that date. On exceptions filed the sum of £6,815 11s. was certified to be due from the bank to the company. On the 9th of August, 1878, on further consideration it was ordered by Molesworth, J., that the bank and Lakeland should give up to the company the quiet possession of the land comprised in the mining lease of the 25th of October, 1867, and the mortgage of the 11th of March, 1873, or either of them, and the mines, shafts, and drifts lying under the same; that if necessary, an injunction should issue to put the plaintiffs in such possession; that the defendants respectively should do such acts and execute such instruments as might be necessary to release and convey to the company all their respective titles and claims to the said lands and mines, to be prepared at the company's expense; and that the bank should pay to the company forthwith the said sum of

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£6,815 11s., with interest thereon, at 7 per cent. per annum, from the 31st of March, 1878.

Mr. *Southgate*, Q.C., and Mr. *Cozens-Hardy*, for the appellant bank: It is entirely opposed to the practice and rules of a court of equity to make a decree for redemption on a bill which does not pray for redemption. It is not sufficient that taking bill and answer together it appears that the suit is in substance one for redemption; the old rule is that a plaintiff coming to redeem must offer to redeem. If a mortgagor admits a mortgage he cannot file a bill for any purpose without offering to redeem. Here the relief sought was wholly inconsistent with the right of redemption. Reference was made to *Inman v. Wearing* ('); **Gordon v. Horsfall* ('); *Johnson v. Fessenmeyer* ('); [396 *Crenner Mining Company, Limited, v. Williams* ('); *Parker v. McKenna* (') (which was said by the court below, see 3 Vict. L. R., 67, to have overruled *Johnson's Case*, although *Johnson's Case* was never cited therein); *Hickson v. Lombard* ('); *Hilliard v. Eiffe* ('); *London and Chartered Bank v. Lempriere* ('); *Troughton v. Binks* ('); *Martinez v. Cooper* ('); *Parkinson v. Hanbury* ('); *Finch v. Brown* ('); *Wilson v. Cluer* ('); *Nelson v. Booth* ('); *Dunstan v. Patterson* ('); *Cotterell v. Stratton* ('); *Norton v. Cooper* (').

Again, assuming that accounts ought to have been directed against the bank, still the bank ought not to have been charged except during the period in which it was itself in possession of the property. It ought not to have been charged as for wilful default or otherwise during the period in which the old company and Lakeland were respectively in possession. At all events, if the bank is to be held liable for receipts either by the old company or Lakeland, it ought also to be credited with all moneys expended by them respectively in working or developing the mine. It was further contended that Cuthbert's purchase of the 6th of August, 1874, was a valid purchase, and extinguished the equity of redemption; and that in any event the bank's sale

(1) 3 D. G. & S., 729.

(2) 5 Moo. P. C., 393, 409, 411, 421.

(3) 25 Beav., 88, 96; and on appeal, 3 De G. & J., 13.

(4) 35 Beav., 353.

(5) Law Rep., 10 Ch., 96, 120; 11 Eng. R., 456.

(6) Law Rep., 1 H. L., 324.

(7) Law Rep., 7 H. L., 39; 9 Eng. R., 27.

(8) Law Rep., 4 P. C., 572; 5 Eng. R., 137.

(9) 6 Ves., 578.

(10) 2 Russ., 198.

(11) Law Rep., 2 H. L., 10.

(12) 3 Beav., 70.

(13) 3 Beav., 136, 139.

(14) 3 De G. & J., 119.

(15) 2 Ph., 341.

(16) Law Rep., 8 Ch., 295.

(17) 5 D. M. & G., 728.

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to Lakeland was a valid exercise of the power of sale contained in the mortgages. Lastly, the bank, against which accounts were directed to be taken as mortgagee, was entitled in the character of mortgagee according to the principles of a court of equity to its costs of the cause. The question of costs is a legitimate subject of appeal, although the appellate court does not on a mere question of costs try the merits of a cause: *Chappell v. Purday* (¹); *Attorney General v. Butcher* (²).

397] *Mr. Joshua Williams, Q.C., and Mr. J. D. Wood for the respondent company: No decision has been cited on the other side to the effect that a court of appeal will set aside a decree for redemption simply on the ground that the plaintiff did not ask for redemption in his bill. The only authority to that effect is a dictum of Lord Eldon's in *Martinez v. Cooper* (³), which it is submitted is not sufficient. The cases cited on the other side are distinguishable from this, for here the bill does much more than seek to set aside the mortgages as invalid. It seeks also, even if the mortgages are held valid, to set aside several collusive arrangements, and pretended and fictitious sales subsequently entered into. A mortgagee who has thus endeavored to defraud his debtor, and is shown moreover on the evidence and master's report to have been considerably overpaid at the date of suit, cannot fall back upon the character of creditor and mortgagee and avail himself of a technical defence and benefit which might have belonged to him in that character. Reference was made to *Incorporated Society v. Richards* (⁴).

As regards the bill of sale to Cuthbert on the 24th of August, 1874, which followed the collusive action, judgment and sheriff's sale of that year, it was, independently of the collusive character of the whole transaction, inoperative as regards the leasehold by reason of the Transfer of Land Statute: see sects. 42, 84, 106. No evidence was given that the Registrar of Titles was served with a copy of the writ of *fiat facias*: see sect. 106. The bill of sale was registered under the 7th part of "the Instruments and Securities Statute, 1864;" but not under the Transfer of Land Statute and is not according to any of the forms set out in the 15th schedule to that act. As regards the sale to Lakeland, that was submitted to be invalid as between the bank and the company, at any rate as regards the leasehold. See sect. 85 of the said statute. No proper notice was given either

(¹) 2 Ph., 227.

(²) 4 Russ., 180.

(³) 2 Russ., 198.

(⁴) 1 D. & War., 258, 334.

under sect. 84 or sect. 85. *Registrar of Titles v. Paterson* (*). Whatever title Lakeland might be able to assert, the company must be placed as far as possible in the same position as regards the bank as if such *sale had [398 never taken place: *Smith v. Harrison* (*). As regards the correctness of the principle on which the accounts were taken in the matter of sale proceeds and interest, see *Montgomery v. Calland* (*); *Quarrell v. Beckford* (*). As regards costs, the decree is right in holding that the mortgagee had by its conduct disintituled itself to costs.

Mr. *Eddis*, Q.C., and Mr. *Shebbeare*, for the respondent Lakeland: The mine is no longer capable of being worked to a profit, and its possession is of no value. Lakeland has no interest in disputing the orders appealed against declaring the invalidity of his purchase so long as he is not held liable for the proceeds of gold obtained by him during his mining operations nor for negligent working. The orders were correct in declaring the sale to him of the plant and machinery valid, and in not holding him liable as aforesaid. He was a *bona fide* purchaser for value without notice of any of the company's rights to impeach the validity of the sale.

Mr. *Southgate*, Q.C., replied.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE: The company which is the first of the respondents in this appeal, and which will, throughout this judgment, be designated as "the company," was incorporated on the 18th of October, 1866, under the provisions of a colonial statute, the Mining Companies Limited Liability Act, 1864, for the purpose of working certain mines at Ballarat. The National Bank of Australasia (the appellant) which will hereafter be spoken of as "the bank," had a branch at Ballarat, and were the bankers of the company. In 1873 the then directors of the company caused to be executed under its common seal two securities in favor of the bank. The first of these was an indenture bearing date the 22d of February, *1873, which, after reciting a reso- [399 lution of the shareholders of the company empowering the directors to borrow money not exceeding £20,000, and an agreement between the directors, purporting to act in pursuance of the powers given to them by that resolution, and the bank for an advance of £10,000, and for having the

(*) 2 App. Cas., 110, 116, 117.

(N.S.), 188; below, 6 Wy., W. & A'B.

(*) In the Privy Council, 41 L. J. (Eq.), 182; 3 Aust. Jur., 44.

(P.C.), 34; 20 W. R., 594; 27 L. T. (*) 14 Sim., 79

(*) 1 Maddock, 269.

repayment of that advance with all further sums in which the company might thereafter become indebted to the bank with interest at the rate of 7 per centum per annum, secured in manner thereafter appearing, and also by an assignment by way of mortgage of the leasehold property of the company bearing even date therewith, assigned, by way of mortgage, the plant and machinery thereby specified. This deed fixed no time for the repayment of the sum secured, but contained a power of sale, expressed in the fullest terms, which the bank was to be at liberty to exercise if the company should make default in payment after service upon it of a demand in writing under the hand of the manager or acting manager of the Ballarat branch of the bank.

The second security, being the further security mentioned in the indenture of the 22d of February, was not executed until the 11th of March in the same year. It was an instrument of mortgage of the leasehold estate therein described, of which the company was the registered proprietor under the provisions of the Transfer of Land Statute, otherwise known as Act No. 301; and it was, with one variation that will be hereafter noticed, in the form prescribed for mortgages by that statute, and was duly registered on the 16th of April, 1873. The property comprised therein will be henceforth called "the mine."

In 1876 the company instituted against the bank and the respondent Lakeland, a purchaser from the bank of the mortgaged property, a suit of which the nature will hereafter be considered. On the 6th of December in that year Mr. Justice Molesworth made an interlocutory decree which amongst other things, directed an account to be taken against the bank as mortgagees in possession. The full bench of the Supreme Court of Victoria affirmed, with some slight variations, the decree of Mr. Justice Molesworth by decree, dated the 3d of May, 1877. Against this last decree the bank obtained leave to appeal on the 16th of May in that year. That appeal is the first of those of which there are 400 Lordships have now to dispose. Pending it, the accounts directed by the decree were taken in the master's office; and on the 9th of August, 1878, an order on further directions was made by Mr. Justice Molesworth, which on appeal was affirmed by the full court by its order of the 30th of the following month. The second appeal to Her Majesty is against this last order.

The two appeals, though heard together, will be considered separately. The first and principal objection taken to

the interlocutory decree is that inasmuch as the company, by its bill, impeached the validity of the mortgage securities which the court affirmed, no decree ought to have been made in the suit except one of dismissal without prejudice to the plaintiff's right to bring a regular suit for redemption. In support of this contention the learned counsel for the bank relied upon the rule of courts of equity to this effect, which they insisted was established by the case of *Troughton v. Binks* ⁽¹⁾, *Martinez v. Cooper* ⁽²⁾, *Gordon v. Horsfall* ⁽³⁾, *Inman v. Waring* ⁽⁴⁾, *Johnson v. Fesenmeyer* ⁽⁵⁾, and *Crenver Mining Company v. Willyams* ⁽⁶⁾.

Their Lordships do not dispute the authority of these cases, but conceive that the present is distinguishable from them, and does not fall within the somewhat strict and technical rule affirmed and enforced in them. It will be found in all of them, if examined, that whilst on the one hand the plaintiff impeached the mortgage securities, the defendant on the other insisted on his rights as mortgagee and nothing more; and that the relation of mortgagor and mortgagee having been established, the court held that the plaintiff could not be allowed to have a decree for redemption on a bill which disputed the existence of that relation, and contained no prayer for redemption. The rule is treated as a privilege incident to the character of mortgagee, which the defendant had throughout admitted and insisted on. But what is the present case? The bill, admitting the execution of the mortgages, insists that such execution was *ultra vires* the then directors, and prays that they may be declared void as against the company; but it also states, and impugns as fraudulent and void against the company, *a series of transactions the effect of which, [401 if valid, would be to destroy the company's right of redemption, and to convert the title of the bank from a mortgage into an absolute title. The 28th paragraph moreover contains a direct statement that the sums advanced by the bank upon the mortgages had been more than satisfied by the value of the gold obtained by them from the mine. And the bill prays, amongst other things, that all the impeached transactions may be declared void as against the company; that possession of the mine, and of so much of the plant and machinery as remains in the possession or control of the defendants, may be restored to the company; and that an account may be taken of all gold, or the proceeds there-

(1) 6 Ves., 578.

(2) 2 Russ., 198.

(3) 5 Moo. P. C., 398.

(4) 3 De G. & Sm., 729.

(5) 25 Beav., 88.

(6) 35 Beav., 353.

of, received by the bank, or which but for their wilful default might have been received from the mine, and of the proceeds of any machinery and plant sold by the defendants, and for payment of what may be found due on taking the account together with interest thereon, "the plaintiffs offering and undertaking to pay or allow to the defendants all sums properly expended by them respectively in the working of the said mine, for the substantial benefit of the property, and also *all other just credits*; and that a proper and necessary accounts may be taken, and all necessary directions given."

The bank by its answer, not relying wholly on its title as unpaid mortgagee, with all the privileges as well as liabilities incident thereto, maintained the validity of the transactions subsequent to the mortgages which were impeached by the bill; alleged that under the circumstances thereinbefore appearing it became absolutely entitled to the property comprised in the mortgages; submitted that it was not liable to account to the company, or to any other person, for its dealings therewith, or for the proceeds of the sale of any of the said property; and denied that the plaintiffs had any title to, or right, or interest in the property the subject of the suit, or the accounts thereby sought.

From this statement of the somewhat loose and informal pleadings in the cause, it plainly appears that the issue raised between the company and the bank were not merely mortgage or no mortgage, but further, whether, by means of its acts subsequent to the impeached mortgage the bank [402] had ceased to be mortgagees, and *had become absolute owners. The court was bound to try all those issues. The dismissal of the suit might have been taken to affirm the title set up by the bank generally, or would at least have left its claim to more than a mere mortgage title, subject to redemption, open to future litigation. Again, if the company, as the court observed, failed to establish its right to have the mortgages set aside, but succeeded on all the other issues, the result was only to modify the relief prayed by the bill, and it was obviously necessary to direct the accounts ancillary to that modification in order to ascertain whether, as alleged by the bill, the bank's advances on the footing of the mortgages had been more than satisfied by their receipts, or whether there was still any balance due to them in respect of those advances. Their Lordships are therefore, of opinion that the rule invoked does not apply to such a case as the present, and conceive that they are in some measure supported in that opinion by the cases of

Montgomery v. Calland (') and *The Incorporated Society v. Richards* ('), which will be hereafter noticed with respect to the other questions raised at the hearing of these appeals. They prefer to rest their judgment on this point upon the distinction taken above rather than upon the general principle upheld in *Parker v. McKenna* ('), *The London Chartered Bank v. Lempriere* ('), and *Hilliard v. Eiffe* ('), because those decisions relate to what should be done on the failure of the plaintiff to prove allegations of fraud in general cases, whereas the rule invoked by the bank in this case is one based upon the relation of mortgagor and mortgagee. The principle, however, of these decisions, so far as it is applicable to this case, is in favor of the company.

Assuming, then, that the bill ought not to have been dismissed on the ground suggested, their Lordships have to consider whether the questions determined in favor of the company were correctly so determined, and whether the decree based on such findings was incorrect either in substance or in form.

Little, if anything, was urged at the bar by way of argument to show that the declarations of this decree touching the *transactions subsequent to the execution of the [403 mortgages were incorrect.

The first of these transactions is the execution sale to Cuthbert in trust for the bank on the 6th of August, 1874, which is the root of the title set up by the bank to an absolute interest in the mortgaged property. The facts proved as to this were the following. In the preceding month of July the company, being indebted to the bank in the sum of £15,384, and being otherwise, as it would seem, in an unprosperous condition, a scheme was set on foot for the formation of a new company, for the issue of new shares the proceeds whereof were to be applied partly in reduction of the debt to the bank, and for vesting the property, subject to the mortgage, in this new company. This, of course, could not be legitimately effected except with the consent of the requisite number of shareholders ascertained by proceedings duly had under the provisions of the deed of association of the company. No such proceedings were had. The course of action adopted was to cause the company's interest in the mortgaged premises to be seized and sold in execution in a collusive action, the proceedings wherein were previ-

(') 14 Sim., 79.

(') 1 D. & War., 158.

(') Law Rep., 10 Ch., 96; 11 Eng. R., 456.

(4) Law Rep., 4 P. C., 572; 5 Eng. R., 137.

(6) Law Rep., 7 H. L., 39; 9 Eng. R., 27.

ously arranged between the then directors of the company and their solicitor, and the manager (Robson) and the solicitor (Cuthbert) of the bank, the purchaser at the execution being Cuthbert, as trustee for the bank. One reason why the bank thus became purchaser seems to have been the apprehension that any stranger who purchased might question the validity of the mortgages. The bank, through Cuthbert afterwards transferred the interest purchased at the execution sale to trustees for the new company, receiving from the latter the sum of £3,400 in reduction of the balance due upon the mortgage.

It is clear that by these collusive proceedings the bank could obtain no good title against the company, and that the Supreme Court of Victoria was right in so declaring. But it is equally clear (and this is material to one question raised touching the form of the decree) that, although the ultimate object of the contrivance was to substitute the new for the old company as mortgagors, with a right of redemption, the effect of the proceedings, if valid, would have been to vest the interest of the old company, i.e., the equity of redemption, in the bank between the date of the execution [404] *sale and of the subsequent transfer to the new company, and to make them absolute owners of the mortgaged premises during that period. That this has been the view of its rights taken by the bank is shown by the third of its grounds of appeal from Mr. Justice Molesworth to the full bench of the Supreme Court of Victoria, and by the first of the "reasons" of its case in this appeal.

The next material act of the bank was the issue of the notice of the 10th of February, 1875 (the terms and effect of which will be afterwards considered). This was somewhat inconsistently served upon the old as well as upon the new company.

Then came the proceedings of the 5th of March, 1875, under which the mortgaged premises were put up for sale, under the powers of sale contained in the indenture of assignment and instrument of mortgage, and knocked down to the Messrs. Davey. This transaction has also been declared by the decree to be void as against the company. A question has been raised whether it was an actual sale, or a mere buying in of the property put up for sale. In neither view can it have had any effect on the right of the company. On the second hypothesis it would necessarily leave the rights of all parties as they were; on the first, the sale would be impeachable by the company, on the ground that the Daveys were merely nominal purchasers on behalf of the bank, who

as mortgagees selling under their power of sale, could not sell to themselves.

The last and most important transaction to be considered is the sale to Lakeland, both of the plant and machinery and of the mine, for one lump sum of £6,000, under the memorandum of agreement of the 15th of September, 1875. Mr. Justice Molesworth held that this sale was unwarranted as between the company and the bank; but as between the company and Lakeland was valid as to the plant and machinery, but not as to the mine. The full court, however (and, there being no cross appeal, its decision on this point must be accepted as final), held that, as between all parties, the sale was valid as to the plant and machinery, but not as to the mine. The question, therefore, is reduced to that of the validity of the sale of the mine.

Mr. Justice Molesworth, being doubtless more familiar than we are here with the provisions of the Transfer [405 of Land Statute, and their application, summarily disposed of this question by saying, "I do not think the bank effectually sold Lakeland the mining lease. It could only make title under 301, and did not." This point, however, having been raised at the bar with some distinctness, at least in Mr. Southgate's reply, their Lordships will deal with it more in detail.

It is not immaterial to consider in what character the bank was dealing with Lakeland in this transaction. On the face of the agreement of the 15th of September, 1875, they do not purport to be acting as mortgagees exercising a power of sale. According to their case, they were then the absolute owners of the mine, inasmuch as whatever right of redemption had existed in the old company had been extinguished by the sale to Cuthbert in 1874, and whatever right of redemption had ever existed in the new company had been extinguished by the execution proceedings taken in March, 1875, against that company (which thenceforth disappeared from the scene), and by the subsequent assignment from Hardy to the bank. It is hardly necessary to observe that a sale of the mine by the bank in the character of absolute owners, which, as between them and the company, they did not possess, could not pass a good title against the company.

If, however, Lakeland, to use Mr. Justice Molesworth's expression, is "entitled to the benefit of all the muddled titles and powers which the bank had to convey to him," and the sale is to be treated as made by the bank in exercise of the power given by the instrument of mortgage, the trans-

action is impeachable upon other grounds. The company was the registered owner of the mine under the provisions of the Transfer of Land Statute, and the mortgage was made under and subject to the provisions of the 83d and following sections of that act, and was duly registered thereunder. The instrument itself is in the form set forth in the 12th schedule to the act, except that it contains, as that form permits, a special covenant or agreement, which will be hereafter considered. Hence the only way in which the mortgagee could extinguish the rights of the mortgagor in the mine was by foreclosure, under 31 Vict. No. 317 (of which there is no question here), or by a sale under the 84th, 85th, 86th, 87th and 88th sections of the Transfer of Land Act. The 84th section provides that if the mortgagor shall make default in payment of the principal sum or interest, and such default shall be continued for one month, or for such other period of time as may therein for that purpose be expressly fixed, the mortgagee may serve on the mortgagor, in the manner therein specified, notice in writing to pay the money owing on the mortgage. The 85th section provides that if such default shall continue for one month after the service of such notice, or for such other period as may in such mortgage be for that purpose fixed, the mortgagee may sell the land, giving him ample powers and discretion as to the mode of sale, and providing that no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale. The 87th section provides that upon the registration of any transfer signed by a mortgagee for the purpose of such sale as aforesaid, the estate and interest of the mortgagor in the land therein described at the time of the registration of the mortgage, shall pass to and vest in the purchaser, freed and discharged from all liability on account of the mortgage, &c.

The special clause in the instrument of mortgage was to the effect that, notwithstanding anything contained in the Land Transfer Act, it should be lawful for the bank, in the event of default being made in the payment of the principal money and interest secured "on such demand being made as aforesaid," immediately to serve such notice of demand as aforesaid in the manner prescribed by the 84th section of the statute on the company, and, after the expiration of fourteen days from the service of the notice of demand, to sell the land in pursuance of the powers in that behalf vested in the mortgagee under the 85th section of the statute.

It has been argued that the demand of the 10th of February, 1875, was the only notice of demand which, under this clause, was requisite in order to support a sale made fourteen days after this service in pursuance of the statutory power. The clause is not very clearly worded, but their Lordships cannot agree in this construction of it. A demand was necessary in order to fix the time of payment. Until its service there could be no default, and it may be further remarked that the demand actually served makes *no reference to the statutory mortgage of the mine, [407 but merely specifies, as the consequence of the failure to make payment forthwith, that the bank will proceed to exercise all or such of the powers contained in the bill of sale (of the chattels) as it shall see fit. The clause in question seems to their Lordships expressly to require service of some notice of demand to be made after default in payment. It may qualify the 84th section by allowing that notice of demand to be served immediately instead of "one month" after default, and the 85th section by allowing the sale to be made fourteen days instead of one month after service of such notice, but it does no more. It does not deprive the mortgagor of the right to have a notice of demand served upon him, after he is in default, as a necessary preliminary to a sale under the statutory power. From a case recently before their Lordships (*Campbell v. Commercial Bank of Sydney*), which arose upon similar provisions in a New South Wales Act, it may be inferred that, upon an application to complete the title of the purchaser by registration under the 87th section, an objection on the ground of the failure to serve a proper notice of demand might, and probably would, have been taken by the Registrar. Again, it follows from both the 42d and the 87th sections of the act under consideration, that, whether the transaction with Lakeland be regarded as a sale by absolute owners or as one by mortgagees under the statutory power, no interest in the mine could effectually pass to the purchaser until registration, and consequently that the agreement of the 15th of September, 1875, was a mere agreement for sale which, whatever equities it created between the bank and Lakeland, left the prior equity of the company untouched.

Their Lordships have now to deal with the particular objections taken to the form of the decree. In order to estimate the weight of these, it will be well to consider what was the general nature of the decree to be made in a suit so framed, and upon the facts so found. The suit was in the nature of an equitable ejectment, in which each party claimed

an absolute interest in the property, for the profits of which the bill sought an account. The court, taking an intermediate view of the rights of the parties, found that the relation of mortgagor and mortgagee originally subsisted between [408] *the parties, and had never been effectively determined; that the transactions on which the bank relied as making their title absolute were void against the company, that consequently it was necessary to take an account of what, if anything, remained due upon the mortgage, and to ascertain whether, as alleged by the company, the bank's charge had been satisfied when the bill was filed.

To such a state of things the observations of Lord St Leonards, in the case of the *Incorporated Society v. Richardson* (¹), apply. When pressed to give the defendants the advantages of a mortgagee in an ordinary suit for redemption, he said, "This is a peculiar case, and cannot be treated as the ordinary case between mortgagee and mortgagor. Here you set up a title adverse to the owner; and when a creditor denies his character as such, and claims as owner, I cannot allow him to fall back on his original character as creditor, as if he had never departed from it. I will never allow a party, who has put the owner at arm's length, to turn round, when defeated, and claim all the benefits attached to the character of a fair creditor."

The particular objections to the form of the interlocutory decree will now be considered in detail. The first was that it charges the bank as mortgagee in possession from the 6th of August, 1874, the date when Cuthbert took possession of the mine. This objection was but faintly pressed, since it is obviously for the interest of the bank that the account should cover the period between that date and February 1875, when the bank resumed actual possession, inasmuch as the yield of the mine whilst the new company worked was worth only £7 19s., whilst the sums allowed for disbursements during the same period, and for which the bank got credit in account, amount to £4,256 5s. 6d. In any case, however, the direction appears to their Lordships to be correct, because it is consistent with the facts established, and with the claim of the bank to an absolute title in the mine as against the company from the date of the sheriff's sale to Cuthbert.

The second and third objections were that the decree erroneously treats the bank as chargeable with the value of [409] the gold obtained, *first, by the new company, and secondly, by Lakeland. Their Lordships are of opinion

(¹) 1 D. & War., 834.

that the bank was properly so treated. As mortgagees in possession they were admittedly accountable, not only for their actual receipts, but for what but for their wilful default they might have received. And it appears to their Lordships that whatever was received by those whom it has been found the bank put into possession without just title, and in derogation of the company's rights, has correctly been held to fall within this category.

Another objection taken to the decree was that, as varied by the full bench, it made the bank chargeable with interest on the principal moneys for which it was held accountable. And the learned counsel for the bank relied much upon the general rule affirmed in *Nelson v. Booth* (¹), to the effect that a mortgagee in possession is not chargeable with interest on his receipts if, when he took possession, an arrear of interest was due to him. This, however, as has been shown, is not an ordinary redemption suit, and the before cited case of the *Incorporated Society v. Richards* (²) is a clear authority that in an exceptional case like this the defendant cannot claim the immunities of an ordinary mortgagee. There Lord St. Leonards ordered the account to be taken with annual rests. Such a direction, though more usual, is in terms less favorable to the defendant than that contained in the decree under appeal, which amounts only to one that interest be allowed on both sides of the account. That it was competent to the court in the circumstances to give such a direction their Lordships entertain no doubt. The question whether the master has correctly calculated interest under that direction was one which could only be raised on an exception to his report, and the bank filed no exceptions thereto. Their Lordships may, however, remark that he seems to have acted correctly in allowing compound interest with half yearly rests on the mortgage debt, that debt being the balance of a current banking account kept in that way; and that, if the interest was to be so calculated on one side of the account, it ought, by parity of reason, to be calculated in the same way on the other side. Whether the bank ought to have been charged with compound interest on the balance found due from it to the *company [410 on the 31st of March, 1876, after that date is, perhaps, a question which might have been successfully raised by an exception to the report. But it was not so raised. Another objection taken was that the interlocutory decree, instead of directing, as in an ordinary redemption suit, the taxation of the bank's costs, and the addition of the certified amount

(¹) 3 De G. & J., 119.

(²) 1 D. & War., 334.

of them to the amount due for principal and interest on the mortgage, reserved the consideration of them until after the taking of the account. It is sufficient on this to say that in a suit of this character such a reservation was, in the Lordships' judgment, within the discretion of the court, and consistent with usual practice. Whether the court, under the reservation, was right in making the order as to costs which it made on further direction, is a question which will be considered on the other appeal. That the costs of the first appeal to the full court were within the discretion of that court their Lordships have no doubt. Nor would they see any grounds for impeaching the soundness of the particular exercise of that discretion were it proper to entertain an appeal on that ground.

An objection on which their Lordships have felt great difficulty is that taken to the direction in the decree, and finally drawn up, that the bank should be charged with "what but for its wilful negligence and default would have been the clear proceeds of the sale of the said plant and machinery."

The bill, which is loosely drawn, made no special case as to the sale of the plant and machinery at an undervalue otherwise than by alleging in the 35th paragraph that the sum of £8,000 was considerably less than the value of the *mine and property* sold to Lakeland, as the bank well knew, and that a larger sum had been, previously to the sale to Lakeland, offered for the said property; and as to the plant and machinery prayed only for an account "of the proceeds of any machinery or plant sold by the defendants or either of them;" saying nothing about negligence or wilful default.

Some evidence was, however, given at the hearing touching an offer of £8,000 for mine and plant, and the value of the latter; and Mr. Justice Molesworth, coming to the conclusion that the whole of the transaction with Lakeland was fraudulent and void as against the company, decreed that the bank should be charged "with the diminution of the value of the mining plant and machinery caused by its selling in excess of its replacing; and with the full value of the mining plant and machinery sold to Lakeland." His decree, therefore, so far as it related to the plant sold to Lakeland, was consistent with his finding; and it cannot be said that there was not some evidence to support both. The difficulty, however, arises on the decree as modified by the full court. Their judgment says, on this point, "We think, however, that the decree must be varied. We consider that

the sale of the chattels was not unwarranted, and that the bank ought not to be charged with the value of the plant, &c.;" and, after dealing with the notice of demand and its effect, adds, "the declaration that the sale to Lakeland was unwarranted as against the plaintiffs, and that the bank should be charged with the diminution in value of the mining plant and machinery comprised in the mortgage, must both be omitted, but the bank must be charged with what but for wilful negligence and default would have been the clear proceeds of the sale of the plant and machinery." And the decree was varied accordingly. At first sight the first passage cited from this judgment seems to be inconsistent with what follows, and with the decree; but upon consideration their Lordships are of opinion that the words "the bank ought not to be charged with the value of the plant," &c., must be taken to refer to the higher value of the plant and machinery before the diminution of that value by the cause contemplated by Mr. Justice Molesworth, and that the learned judges did not thereby intend to overrule Mr. Justice Molesworth's conclusion that the plant sold to Lakeland was sold for less than its true value.

There was no *constat* of what was actually received by the bank from Lakeland in respect of the plant, one lump sum of £6,000 having been paid for both mine and plant, and some inquiry on this point was therefore necessary. If the court were satisfied that the price paid for both subjects was a fair one, the proper inquiry was, of course, how much of the £6,000 was attributable to the price of the mine, and how much to the price of the plant. On the other hand, if it had grounds for supposing that the plant had been sold at an undervalue owing to the want of due care and diligence, the ordinary reference to the master would be to charge the defendants with what but for their wilful [412] negligence and default might have been received. The full court appears to have corrected the judgment and decree of Mr. Justices Molesworth by substituting this direction for his direction to charge the bank with the full value of the plant and machinery, a change in favor of the defendants.

Upon the whole, their Lordships have come to the conclusion that the full court, as well as Mr. Justice Molesworth, had sufficient grounds for holding that the plant might have been sold for less than could have been obtained for it, regard being had to the 35th paragraph of the bill, to the evidence in the cause, and to the conduct of the bank in selling for one sum that which they had a right to sell with that which they had no right to sell. They are therefore of

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opinion that the appeal against the interlocutory decree wholly fails.

Little need be said on the second appeal. It has already been remarked, that if the interlocutory decree is right no question can be raised as to the accounts taken under it inasmuch as the bank filed no exception to the master's report. The case is still stronger against the bank on this point, for it appears from Mr. Justice Molesworth's judgment that the plaintiffs having filed exceptions, of which some were allowed, the defendants consented that instead of sending the case back to the master, the court should draw up an order as of the 22d of July, 1878, fixing the amount due from the bank at £6,815 11s. The only question that remained was, what was to be done as to the costs of the suit. Now not only had the bank set up, and failed to prove, a title to an absolute interest in the property, not only had it sought to destroy the right of its mortgagor by a series of very questionable transactions, but it had been found to have been overpaid, in its character of mortgagee, when the bill was filed. These circumstances were amply sufficient to deprive it of the ordinary right of mortgagee to the costs of suit, and to bring the question before whom the costs were to be borne within the discretion of the court. Their Lordships can see no ground for interfering contrary to the ordinary practice of this tribunal, with the discretion, and must therefore humbly advise Her Majesty to affirm the decree of the 3d of May, 1877, and the decretum [413] *order of the 30th of September, 1878, and to dismiss these appeals with costs.

Solicitors for the appellant: *Wadeson & Malleison.*

Solicitor for the respondent company: *Thomas Randall.*

Solicitors for respondent Lakeland: *Brundrett, Randall & Goret.*

In the absence of an agreement between the parties, the receipt of rents and profits from mortgaged premises by a mortgagee in possession, to an amount sufficient to satisfy the mortgage, is not a *legal* satisfaction thereof. The mortgagor must resort to an accounting in equity in order to have such receipts so applied; and until they are applied in satisfaction by a judgment of the court, the character of the mortgagee as mortgagee in possession is not divested, and the legal action of ejectment cannot be main-

tained against him or his grantee: *Hu bell v. Moulson*, 53 N. Y., 225.

Though such rents and profits are a valid set off or defence.

Equity regards that as done which ought to be done: 1 Story's Eq. Jur. § 64 g.; 1 Pomeroy's Eq. Jur., § 363.

Where the right of the payee to dorse without recourse appears, substantial justice is promoted, by regarding it as done, and its being done the merest matter of form: *Moore v. Cross*, 19 N. Y., 227, 230, 17 Ho. Pr., 385, 389.

It was not necessary that the mortgagee should go through the *form* of applying the money so paid on the mortgage. The law looks through mere form to the proper legal effect of the transaction : *Pratt v. Foote*, 9 N. Y., 463, 468, 10 id., 601; *Beach v. Smith*, 30 id., 131; *Rogers v. Hosack's Exrs.*, 18 Wend., 339; *Patterson v. Guardians*, 1 Hurlst. & Norm., 523, 526; *Merchants' Bank v. Elderkin*, 25 N. Y., 179-180.

There can be no necessity in such a case for showing an express agreement to accept the check in payment; the transaction is *per se* a payment. So far as any agreement is necessary, it arises by implication from the acts done : *Pratt v. Foote*, 9 N. Y., 468, 10 id., 601; *Kelly v. Bruce*, 17 N. Y. Weekly Dig., 39.

Their agreement alone, in this respect, without more, is sufficient : *Rogers v. Hosack's Exrs.*, 18 Wend., 339.

Where the mortgagee takes possession of the mortgaged premises before foreclosure, and occupies them himself, he must account for the rents and profits, at the rate of rent which the premises by ordinary care would have produced, exclusive of taxes and repairs : *Van Buren v. Olmstead*, 5 Paige, 9, 12; *Quinn v. Brittain*, 3 Edw. Ch., 314, 315; *Hubbell v. Moulson*, 53 N. Y., 229; *Hughes v. Williams*, 12 Ves., 494; *Montague v. Boston*, etc., 124 Mass., 242, 246; *Kelly v. Bruce*, 17 N. Y. Weekly Dig., 39, 29 Hun, 144, mem.; *Matthews v. Memphis*, etc., 28 Alb. L. J., 136, 2 Sup. Ct. Repr., 780, 786.

See *Pugh v. Davis*, 2 Mackey, 23, 96 C. S., 332; *Morris v. Budlong*, 78 N. Y., 543, 555; *Argall v. Pitts*, Id., 239.

So if he have not kept, and does not present, proper accounts so as to show satisfactorily the real receipts and disbursements, he is liable for a reasonable rental : *Montgomery v. Chadwick*, 7 Iowa, 114, 134, and cases cited; *Dexter v. Arnold*, 2 Sumner, 108; *Gordon v. Lewis*, Id., 144; *Harris v. Ferris*, 18 Fla., 84.

No charge can be allowed for trouble and expense : *Clark v. Smith*, 1 N. J. Eq., 122.

A mortgagee by taking possession assumes the duty of treating the property as a provident owner would treat it. He is bound to keep it in good ordinary repair, and if it be a farm he is bound to good ordinary husbandry.

A mortgagee of a farm having taken possession thereof must show reasonable diligence to procure a tenant, or he will not be relieved from the charge of rent on the ground that the farm was not cultivated, and if he cannot find a tenant for the buildings and the farm, he should cause the farm to be tilled.

Annual rents allowed against a mortgagee in possession when the annual rents and profits and wood and timber cut from the premises exceeded the interest and expenses : *Shaffer v. Chambers*, 6 N. J. Eq., 548.

A mortgagee who takes possession of the lands mortgaged to him, either by himself or a tenant, is chargeable with a reasonable rent.

He is liable, whether he receives rent or profit, or not : by taking possession he assumes the position of owner, and is therefore chargeable with the profit a provident owner could have made.

But actual possession, or a reception of the profits, or a fraudulent use of his power as mortgagee to the loss of a subsequent incumbrancer, must be shown to render him liable : *Dawson v. Drake*, 30 N. J. Eq., 601.

"Actual possession either in person or by a tenant, or a receipt of profits or some fraudulent use of his power as mortgagee, to the loss of a subsequent incumbrancer, must be shown, to render a mortgagee liable to account (*Dawson v. Drake*, 30 N. J. Eq., 601). But if a mortgagee be in possession, or acts *mala fide* in regard to subsequent incumbrancers, or refuses to enter, but suffers the mortgagor to take the profits and protects his possession by means of his mortgage, he will be charged not only with all profits received, but with all that he might have received by the use of reasonable diligence and prudence (*Demarest v. Berry*, 16 N. J. Eq., 481; 2 Jones' Mort., § 1121": *White v. Maynard*, 54 Verm., 530.

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[4 Appeal Cases, 413.]

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[PRIVY COUNCIL.]

LONDON CHARTERED BANK OF AUSTRALIA, *Defendant*; and
WHITE and Others, *Plaintiffs*.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA (IN EQUITY).

Banker's Lien—Accounts—Interest.

Bankers most undoubtedly have a general lien on all securities deposited with them as bankers by a customer, unless there be an express contract or circumstance that show an implied contract inconsistent with the lien.

Brandao v. Barnett and others ⁽¹⁾ approved.

Held, that the bankers having acquiesced in the finding of the first court, that the securities deposited with them were in respect of specific sums and not on the general account, and not having objected thereto in their grounds of appeal to the Supreme Court, were precluded from raising that question in appeal to the Privy Council.

Simple interest only should be allowed on such specific amount, as to a mortgage.

Bankers improperly or without title retaining moneys overpaid to them as mortgagees are chargeable with interest thereon.

APPEAL from an order of the Supreme Court (Sept. 21, 1877), affirming with certain variations an order of Mr. Justice Molesworth (May 11, 1877).

The principal question sought to be raised in this appeal [414] was, *whether certain securities placed by a customer in the hands of the bank ought to be treated as a security for the customer's general account with the bank, or whether they are to be considered as applicable only to the particular advance on the occasion on which they were given.

The appellant bank was incorporated by royal charter and in the year 1858 one Hugh Glass was its customer. He continued so until his insolvency in 1869. The relations between them of banker and customer were ultimately determined by an assignment made by Glass of his estate and effects for the benefit of his creditors on the 3d of December, 1869.

The facts of the case and the agreements entered into between Glass and the bank are set out in the judgment of their Lordships.

The suit was instituted on the 8th of June, 1876, by the

(*) *Present*:—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE SMITH, and SIR ROBERT P. COLLIER.

(¹) 3 C. B., 531; 12 Cl. & F., 787.

respondents the Whites, as second mortgagees of "the Clare stations and stock," against the bank, as first mortgagees thereof and of the "Nouranie run," and the respondents Blackwood and Ibbotson, as second mortgagees of the "Nouranie run," to have their respective rights as mortgagees of the said properties ascertained and determined. The nature of the suit is more particularly set forth in their Lordships' judgment. Other respondents, Nash and Moore, were added as defendants, as being, in manner appearing in the suit, entitled to the equity of redemption of the properties.

By the decree dated the 11th of May, 1877, it was ordered that it be referred to the master to take an account of the mortgage debt due to the bank, taking it as on the 1st of July, 1869, as £40,000, bearing interest at £8 per cent., and of the sums received by the bank in satisfaction thereof as mortgagee in possession, and as sellers of the corpus of the securities of Clare stations and the stock thereon, and the Nouranie station; and it was ordered that in taking the account the bank have credit over all expenses and disbursements for the purchase-money of the freehold of part of the last-mentioned station, and be charged with the price received on the sale thereof; and it was also directed that the account be taken with convenient rests reducing principal, but that no interest upon interest be allowed; and it was declared that on taking the *accounts the bank [415 was not to be allowed anything for costs and expenses connected with the conveyance of the 3d of December, 1869, or for payments made to creditors of Glass in arranging for the conveyance (without prejudice to any other remedies which the bank might have for recovering the same); and it was directed that the bank should not be allowed in that account for any costs in a suit in the Supreme Court of New South Wales in the bill referred to; and the master was directed in taking the account to allow the bank disbursements and expenses for the Clare stations and stock paid and furnished by the plaintiffs, as well as those made and paid by itself, and to fix the time when, according to the accounts, the bank should be deemed to be overpaid, and to compute the sum which the bank should be deemed to be overpaid, charging it with interest on that overpayment, and all subsequent clear receipts at the rate of 8 per cent. per annum to the making of his report; and the master was also directed to take the above accounts, not giving the bank credit for disbursements paid and furnished by the plaintiffs; and it was declared that the plaintiffs were entitled to

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the difference of the results of the two accounts; and it was declared that the plaintiffs should be treated as subject to pay the costs of the bank properly incurred in defending the suit in New South Wales above referred to, not recoverable from the plaintiffs therein; and it was referred to the master to ascertain the same; and it was directed that the last two sums be set off one against the other, and it was declared that the plaintiffs and the defendant James Blackwood and Charles Ibbotson, were entitled to have the sum which might remain in the hands of the bank according to the first account, subject to such costs as might be made payable thereout, divided according to the direction next following. And it was declared that the bank should have been paid its debt of £40,000 and interest out of the Clare stations and sheep and the Nouranie stations ratably according to their respective values as might appear by the sums actually realized thereout respectively by the possession and sales thereof, and having regard to interest as to the different dates of the receipt of such sums; and it was referred to the master to take an account of the sums contributed to the payment of the debt by the properties respectively over and above the sums which the bank should have contributed, and according to the result to appropriate the said balance between them; and by consequence it was directed that thenceforth the bank should hold £4,239 17s. 1d. of the sum then in its hands at interest at the rate of £4 per centum per annum for six months from the date of the decree, instead of at the rate of £8 per centum, without prejudice to the right of the parties to dispute the sum due, and further consideration and costs were reserved.

The bank appealed, and the Supreme Court was divided in opinion as to whether the banking account could be considered as covered by the securities of the 8th of April, 1868. By the order on appeal, dated the 21st of September, 1877, it was ordered that the appeal be allowed, and that the decree be varied by striking out so much thereof as declared that on taking the accounts the bank was not to be allowed anything for costs and expenses connected with the conveyance of the 3d of December, 1869, or for payment made to creditors of Glass in arranging for the conveyance without prejudice as therein mentioned. And it was referred to the master to inquire and report whether the bank ought to be allowed any and what sum for such costs, expenses, and payments as aforesaid as against the plaintiffs and the defendants, James Blackwood and Charles

Ibbotson, or any and which of them; and it was ordered that the decree be further varied by striking out so much thereof as directed the master to charge the bank with interest on the overpayment to the bank therein mentioned, and on all subsequent clear receipts at the rate of £8 per cent. per annum to the making of his report, and in lieu thereof the master was directed to charge the bank with interest at the rate aforesaid on so much only of the overpayment as the bank had theretofore claimed to retain as mortgagee, but to which, on taking the accounts directed by the decree, the bank should appear not to be entitled; and with these variations the court affirmed the decree, and the court did not think fit to give the costs of the appeal to any of the parties appearing therein.

Mr. *Kay*, Q.C., and Mr. *MacNaghten*, for the appellants: The order appealed from ought to be varied by declaring that the bank had a general lien on the securities of the 8th of April, *1868, placed in their hands, and could [417 hold the same against the balance from time to time owing by Glass on his general account, *Brandao v. Barnett* ⁽¹⁾; *Jones v. Peppercorne* ⁽²⁾, where it was held that the general lien of a banker is not excluded by a special contract unless the terms of that special contract are inconsistent therewith: *Johnston's Case* ⁽³⁾; *Mosse v. Salt* ⁽⁴⁾; *Agra Bank Case* ⁽⁵⁾; *Ex parte Trethowan*, *Ex parte Tweedy* ⁽⁶⁾. Here there was no contract, express or implied, inconsistent with the bank's lien. Therefore whatever was due to the bank by Glass before the notices of the 3d of June and 27th of July, 1869, was secured by the deposits in their hands on which the bank had a general lien. After those notices the bank, of course, could not charge against the subsequent mortgagees advances made thereafter: *Hopkinson v. Rolt* ⁽⁷⁾.

With regard to the claim of the bank to make half-yearly rests converting interest into principal: see *Fergusson v. Fyffe* ⁽⁸⁾; *Crosskill v. Bower* ⁽⁹⁾; *Williamson v. Williamson* ⁽¹⁰⁾; *Rufford v. Bishop* ⁽¹¹⁾. With regard to the items of costs, it was submitted that as regards the rival claimants to the surplus proceeds arising from the securities either could have taken interpleader proceedings, while the bank could not pay either of them until their rights were adjusted

⁽¹⁾ 3 C. B., 531; 12 Cl. & F., 787.

⁽²⁾ Joh., 430.

⁽³⁾ L. R., 6 Ch. Ap., 212.

⁽⁴⁾ 32 Beav., 269.

⁽⁵⁾ Law Rep., 8 Ch., 41.

⁽⁶⁾ 5 Ch. D., 559; 22 Eng. R., 307.

⁽⁷⁾ 9 H. L. C., 514.

⁽⁸⁾ 8 Cl. & F., 139.

⁽⁹⁾ 32 Beav., 86.

⁽¹⁰⁾ Law Rep., 7 Eq., 542.

⁽¹¹⁾ 5 Russ., 346.

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by the court. The bank was not chargeable or charged with misconduct, and there was no ground for depriving the bank of costs, or for reserving the costs to abide the result of the accounts: *Cotterell v. Stratton* (*). Nor was there any ground for charging the bank with interest on any part of the surplus proceeds in its hands. It was also contended that the bank was entitled to the full costs of defending its securities in the suit brought by Blackwood and Ibbotson.

Mr. *Southgate*, Q.C., and Mr. *Cecil Russell*, for the respondents: The securities of the 8th of April, 1869, could 418] not be charged in *favor of the bank with any principal moneys other than the original loan of £40,000, and one moiety of the sums expended for working expenses in carrying on the Clare stations. Securities taken in the manner and on the terms upon which these were taken exclude the general lien: see *Mosse v. Salt* (*) and analogous cases, where it has been held that solicitors taking securities for special purposes have lost their general lien: *Vaughan v. Vanderstegen* (*); *Pelly v. Wathen* (*). In particular the bank was not entitled to charge thereon any allowances made to Glass either before or after the 2d of June, 1869. A man cannot have possession in two characters, first, as mortgagee, and second, as banker. The one excludes the other. Reference was then made to *Ex parte Trethowan* (*). With regard to the claim of compound interest made on the other side, that is not chargeable under the circumstances of this case.

With regard to the point made upon the other side as to the bank's not being liable for interest on the surplus proceeds retained by it, see *Quarrell v. Beckford* (*); and as regards its claim for costs said to have been incurred in defending its securities, see *Parker v. Watkins* (*); *Walters v. Woodbridge* (*). As to reservation of costs; where an overpayment is alleged it is the practice to reserve the costs until the result of the account directed by the court is known. *Cotterell v. Stratton* (*) was a decision on further consideration.

Mr. *Kay* replied.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER: The material facts of this case may be thus stated: In the year 1858 one Glass became (if he had not been before) a customer of the appellants the

(1) Law Rep., 8 Ch., 295.

(2) 32 Beav., 269.

(3) 2 Drew., 413.

(4) 7 Hare, 351.

(5) 5 Ch. D., 559; 22 Eng. R., 307.

(6) 1 Madd., 269.

(7) Joh., 133.

(8) 7 Ch. D., 504; 23 Eng. R., 666.

London Chartered Bank of Australia, and entered into an agreement with them on the 3d of May, 1868, embodied in the following letter to the manager: "In consideration *of your from time to time discounting on my request [419 such bills of exchange or promissory notes as I may hand to you for that purpose, and which you may approve, or granting me an advance in the shape of an overdrawn account, I hereby undertake and agree that the bank shall have a lien on all securities that may belong to me, and which may be in the hands of the bank at the time of the discounting for me of any bill or note, or that may come to the hands of the bank during the currency of any bill or note as a security for the due payment at maturity of the same, or for the repayment of any amount I may be overdrawn." He continued to be a customer of the bank from that time up to the year 1868, upon the terms of this note, and considerable transactions took place between them. On the 8th of April, 1868, Glass gave the bank the following memorandum, indorsed on the mortgage deed to which it refers: "In consideration of the sum of £40,000 sterling (less discount thereon) this day advanced and paid to me by the London Chartered Bank of Australia, the receipt whereof I hereby acknowledge, I hereby transfer the within written mortgage, and ~~all~~ my right, title, and interest therein, and moneys thereby secured, unto the said London Chartered Bank of Australia, its successors and assigns. As witness my hand this 8th of April, 1868." This memorandum was subsequently registered on the 29th of May. The mortgage referred to in it was from one Nash of an extent of country which may be called the Clare run, with a large amount of stock upon it, which Nash had mortgaged to Glass in consideration of a sum of £63,000 due from Nash to him; and Nash had at the same time given Glass four bills of exchange notes amounting to the sum of £63,000, which at the same time Glass deposited with the bank. On the same day Glass also gave to the bank this letter addressed to the chief Commissioner of Crowy Lands, Sidney: "Sir, I hereby notify to you that I have assigned and transferred to the London Chartered Bank of Australia all my right, title, and interest in and to the run of Crown Lands situate in the district of Murrumbidgee, and known as Nouranie or Nowcranie, now held by me under promise of lease from the Crown, and I hereby relinquish in favor of the said London Chartered Bank of Australia all and any rights or privileges of occupation or of pre-emption which may belong or accrue to me *as the holder of a promise of lease of the said [420

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run under the laws and regulations for the time being. A witness my hand at Melbourne this 8th day of April, 1868.' The bank upon these securities discounted a promissory note of Glass's at four months' date for £40,000, and subsequently, when that note was renewed, they discounted the renewal of it, and they discounted further renewals crediting him with the amount, less discount, and debiting him with the £40,000. It appears that in September, 1868, upon the first renewal of the note, they took from him a further memorandum. It is in these terms: "2d September, 1868. In consideration of your having discounted at my request my promissory note in favor of the bank for £40,000, say £40,000 sterling, dated the 1st of August, 1868, and payable five months thereafter, I hereby, in security of its due payment or of any renewals thereof, deposit in your hands the transfer of license of Nowcranie run, in the Murrumbidgee district in the colony of New South Wales, together with an assignment of a mortgage executed in my favor by William Nash over Clare blocks, known as Clare A, Clare B, Clare C, North Clare A, and North Clare B stations, in the Darling district in the colony of New South Wales, dated the 8th of April, 1868: also license of said stations. And I also undertake, when called upon so to do, to make an assignment to you of the above mortgage with all my interests and powers conferred therein." The next date material to notice is the 22d of May, 1869, when an assignment of whatever right and interest Glass had in the Nowcranie run was transferred by him to Messrs. Blackwood & Co.; and on the 31st of May, 1869, Glass executed a second mortgage of the Clare run to Messrs. Andrew Bridges White and James White, the plaintiffs in this suit. Notice of their second mortgage was given to the bank by the Messrs. White on the 3d of June, 1869, and of theirs by the Messrs. Blackwood & Co. on the 27th of July, 1869. Messrs. White being desirous that the bank should not exercise their power of sale of the Clare run, as it appears they were disposed to do in June, 1869, came to an arrangement with the bank (upon which nothing in this case turns) that half the expenses of the run should be divided between them. The bank took possession about the beginning of July, 1869. Glass became a bankrupt on the 3d of December, 1869, and subsequently [421] the bank sold the Clare stations *and stock for the sum of £26,692, and its interest in the Nouranie station for £15,000, making together a sum above £40,000.

In the year 1876 Messrs. White instituted the present suit, in which they stated the facts which have been men-

tioned, and prayed that accounts and inquiries should be made for the purpose of ascertaining the net proceeds of the Nouranie station received by the bank, and for the purpose of ascertaining the net profits and proceeds of the Clare stations and stock, and of the sale thereof, received by the said bank after deducting all charges and expenses of the said bank while mortgagee in possession, including all moneys paid by the plaintiffs; and also "an account of all moneys which became due to the said bank for principal and interest on the security of the indenture of transfer of mortgage of the 8th of April, 1868, in the bill mentioned, such account not to include any principal moneys exceeding £40,000, or any advances which may be claimed to have been made by the said bank subsequently to the 3d of June, 1869, or interest upon any interest converted into principal; and in calculating interest on the principal moneys due to the said bank, regard being had to the date at which the said principal moneys were in fact paid off by the receipt of the proceeds of sale of the Nouranie station and of the Clare stations and stock;" and further "that it may be declared that the net proceeds of the Nouranie station, and the net proceeds of the Clare stations and stocks to be ascertained by the accounts hereinbefore prayed, are to be deemed to have been applied by the said bank ratably in satisfaction of the debt due to the said bank;" and they further prayed for the payment to the plaintiffs of the balance of the net proceeds of the Clare station and stock which remained after such ratable deduction.

The case of the bank, as far as it is material to notice it at present, was chiefly this, that the effect of the letter of 1858, coupled with the transactions in 1868, and indeed all their dealings with Glass, had the result of the bank being entitled to treat the above mentioned securities as applicable to the balance of the general account, and not only to the specific sums which it was contended on the other side they were given to secure.

Their Lordships adopt the law which is thus very shortly and clearly stated by Lord Campbell as applicable to questions of "bankers' lien in the well-known case of [422 *Brandao v. Barnett and others* (1), "Bankers most undoubtedly have a general lien on all securities deposited with them as bankers by a customer, unless there be an express contract or circumstances that show an implied contract inconsistent with lien."

But though the law is sufficiently clear, its application to

(1) 3 C. B., 531; 12 Cl. & F., 787.

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the facts of this case involves a question of some nicety, viz., whether the transactions should be treated as governed by the letter of 1858, or by the principle of general lien; whether the memorandum of 1868 and the subsequent letter of September of that year, did not effect a contract, express or implied, inconsistent with the letter of 1858, or with general lien. In the view which their Lordships take of the case, it appears to them unnecessary to decide the question.

The case came in the first instance, before Mr. Justice Molesworth. The question which has been just referred to was undoubtedly argued before him, and appears to have been decided by him adversely to the bank. Their Lordships observe that in the course of his judgment he uses the following expressions: "The bank's original dealing as creditors was with interest at 8 per cent., and that is the current rate of interest; so that is the rate which I shall hold it entitled to receive and be charged when overpaid. The bank's pass-book running to about the 1st of July, 1869, mixes its dealings up to that date. If Glass had reduced the debt of £40,000, his second mortgagees would be entitled to the benefit. I have stated that the bank would not be entitled to subsequent advances." (It may be here observed that there is no question but that after the notices received from the bank by the different mortgagees, the one dated the 1st of June, and the other the 27th of July, 1869, the bank could not make any subsequent advances which would be chargeable as against the mortgagees who had thus given notice.) "If Glass had reduced the debt of £40,000, his second mortgagees would be entitled to the benefit. I have stated that the bank would not be entitled to subsequent advances; still, a question would remain as to appropriating Glass's payments to such advances, or to the interest on the £40,000. I cannot connect the pass-book with the account [423] of the bank sought to be relied on in this suit. I take it from the pass-book that about the £40,000 was due on the mortgage securities of April, 1868, when the bank became mortgagees in possession, July, 1869; that since then it has been paid off by receipts as mortgagees in possession, and by selling the corpus of the two several securities; and that there have not been subsequent direct dealings between it and Glass which should be brought into account, and shall frame a decree on that basis subject to such objections as I may hear, refer it to the master to take an account of the mortgage debt due to the defendant to the London Chartered Bank of Australia, taking it as on the

1st of July, 1869, as £40,000, bearing interest at 8 per cent., and of the sums received by the said bank in satisfaction thereof as mortgagees in possession or as sellers of the corpus of the securities, the Clare stations in the bill mentioned, and the stock therein, and the Nouranie station; . . . and direct that the account be taken with convenient rests, reducing principal, but that no interest on interest be allowed," and the decree is in substance in accordance with the judgment upon this point.

The first ground upon which the banking company appealed from this judgment to the full court was this: "That in taking the account of the mortgage debt in the said decree mentioned, the defendant bank is entitled to make half-yearly rests, converting interest into principal, and his honor ought so to have declared in lieu of directing that no interest upon interest should be allowed." The second ground refers to the rate of interest: "That in taking the said account the said bank is entitled to charge interest at the current bank rate on overdrafts, and his honor ought so to have declared instead of allowing interest at 8 per cent. only."

It appears to their Lordships that if the bank had desired to contest the finding of Mr. Justice Molesworth on the subject of the principal sum secured by the mortgages, their grounds of appeal would have been totally different. Their contention would have been that instead of taking the principal sum of £40,000 as that due on the 1st of July—which their Lordships cannot help thinking he does to a certain extent in favor of the bank—their contention would have been that the bank's general account as it *stood at [424] the time of the insolvency should have been looked into, and that it should have been ascertained how much Glass was then indebted to them, no advances subsequent to the reception of notice by them being allowed. Their Lordships are by no means satisfied that if the account had been so taken it would not have been less favorable to the bank than the way in which Mr. Justice Molesworth dealt with the debt; but, be that as it may, the bank seem to have, probably for good reasons, acquiesced in his finding of the amount of £40,000 as the principal of the mortgage debt.

Such undoubtedly appears to have been the view of the High Court, for the High Court stated that they were not agreed upon the main question as to whether the bank was or was not entitled to treat the securities as deposited with them in respect only of specific sums or on their general account, but they treat that difference of opinion as immaterial,

inasmuch as all they had to do with was the question of interest.

That being so, it appears to their Lordships that the bank must be confined to the grounds which they took before the High Court, and on which the High Court decided, and that the bank having been then satisfied that the mortgage debt should be taken to be the specific sum of £40,000 and not the balance of the general banking account, must be satisfied to take the consequences, namely, that they should be allowed simple interest only upon that amount, as they would be as mortgagees. They also think that the rate of interest to which the bank objected was the proper one.

It remains only to notice the other grounds of appeal. Nothing arises upon the third ground on which the judgment was modified. The fourth ground is, "That the said bank ought not to be charged with interest on the amount of its overpayment or subsequent receipts, or, if charged with any interest thereon, ought not to be so charged for any period prior to the commencement of this suit, or at a higher rate than 4 per cent. per annum." The judgment of Mr. Justice Molesworth, which went to the extent of directing that the master "should fix the time when the bank should be deemed to be overpaid, and compute the sum which the bank should be deemed to be overpaid, charging interest on that 425] overpayment *and all subsequent receipts," the full court has modified, probably on the ground, which has been properly argued, that the bank were, as it were, between two fires—there were two claimants, and it was very difficult for them to determine what they should pay over and to whom. The decree of the full court stands thus: "And this court does further order that the said decree be further varied by striking out so much of the said decree as directs the said master to charge the said bank with interest on the overpayment to the said bank therein mentioned, and on all subsequent clear receipts, at the rate of 8 per cent. per annum to the making of his report, and in lieu thereof this court doth direct the said master to charge the said bank with interest at the rate aforesaid on so much only of the said overpayment as the said bank has heretofore claimed to retain as a mortgagee, but to which, upon taking the accounts directed by the said decree, the said bank shall appear not to have been entitled." This, at all events, would confine the chargeability of interest to such sums only as in the opinion of the master the bank had improperly, or without title, retained, claiming them on their own account, and not merely on account of any difficulty as to who should be entitled to re-

ceive them. It appears to their Lordships very difficult to say that this direction is wrong, or that it is not possible that such a case may be made out before the master, of withholding or delaying payments, as would justify him in acting upon this direction.

It was further argued before their Lordships that the decree was wrong in a comparatively small point which may be thus stated : It seems that Messrs. Blackwood had brought an action against the bank in which the Messrs. Blackwood claimed to have the first security upon the Nouranie run. The bank succeeded in the courts in the colonies and also in the appeal to Her Majesty, and Mr. Justice Molesworth appears to have intimated that they were entitled, as against the plaintiffs, to their costs as between solicitor and client in the courts of the colony, but not before the Privy Council, inasmuch as the Privy Council had directed a specific sum to be paid. There is no ground of appeal applicable to this point, and their Lordships are therefore unable to deal with it; but they may observe that they cannot concur in the distinction *taken by Mr. Justice Molesworth be- [426] tween the two sets of costs. As the decree stands, it may possibly be open to the master to take the view which is contended for on behalf of the appellants.

The only remaining question is as to costs. The judge of the court below has reserved the costs of the suit. Their Lordships are unable to see that he was wrong in doing so. It may be (though it is impossible to predict this) that the bank in the end may get all their costs. It does not appear to their Lordships that any inflexible rule, such as it has been contended prevails in mere redemption suits, applies here. This is not, strictly speaking, a mere redemption suit, and under the circumstances their Lordships do not think any case has been made out so strong as would induce them to exercise a discretion, which they very seldom do, of interfering with the judgment of the court below on the question of costs. With respect to the costs in the appeal below, both parties to a certain extent succeeded, and it seems fair to have made each party pay their own costs.

Under these circumstances their Lordships will humbly advise Her Majesty that the judgment of the court below be affirmed, and that this appeal be dismissed with costs.

Solicitors for the appellant: *Freshfields & Williams.*

Solicitors for the respondents, the Whites: *Wadeson & Malleon.*

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As a rule, a bank has a general lien on all moneys and funds of a depositor in its possession for the balance of a general account: *Morse on Banking*, (2d ed.), 42.

A bank or banker has a lien on all moneys and securities of a customer coming into his possession in the regular course of business, for any balance due him on general account: *Matter of Tallahassee, etc.*, 64 Ala., 567.

An advance by a bank upon the general credit of a customer, will establish a banker's lien on all bills for collection in his hands at the time: *Colonial, etc.*, v. *McDonald*, 5 Vict. L. R. (Law), 214.

A banker has a general lien upon all securities in hand belonging to any customer of the bank, which have been lodged with him as security, and that lien extends to any general balance that may be due, unless there is evidence to show that the security was received under special circumstances that took it out of the general rule.

An indorsement on a title deed "lodged to cover overdrafts," and signed by the bankrupt, gives a right of lien to the banker as against the assignees in bankruptcy, as well for overdue bills charged to the bankrupt's account as for money drawn out by checks: *In re Williams*, Irish Rep. (3 Eq.), 346.

A banker may have a lien for his general balance upon title deeds of his customer deposited with him as banker; but not over deeds deposited for safe custody merely: *Dale v. Bank of New South Wales*, 2 Vict. L. R. (Law), 27.

A bank holding a customer's demand note has a lien upon the proceeds of drafts delivered to it for collection after the giving of the note, though collected after filing of petition in bankruptcy, and can apply such proceeds upon the note: *In re Farnsworth, Brown & Co.*, 5 Biss., 223.

General liens of a banker or broker for a balance of account are not favored: 2 Kent's Com., 634, 636.

If there be a usage giving to persons engaged in discounting, buying, advancing on, or selling bills or notes, a lien for a general balance against their customer, such usage should be proved. It will not be presumed to exist in the absence of an express agreement. Courts have taken notice, judicially, of

the lien of bankers who are strictly such and who are dealers in money; but even the lien of a banker does not exist in any case, if there be circumstances existing that are inconsistent therewith: 3 Man., Gr. & Scott, (3 Com. B., 1851), 519; *Grant v. Taylor*, 35 N. Y. Sup. Ct., 338.

A bank has a right to hold a cash dividend as pledged for the indebtedness of the shareholder to the bank. A banker had sued an overdue note of its stockholder, discounted by the bank, and attached his shares. During the pendency of this action the stockholder demanded payment of the dividend declared upon the attached shares, which was refused. He subsequently settled that suit, and then, without renewing his demand, brought the present action for his dividends. Held that it could not be maintained: *Haggard v. Union, etc.*, 63 Maine, 509.

A bank has not a right to detain a customer's deposit to pay or apply upon an indebtedness of the customer to the bank not yet matured: *Jordan v. National, etc.*, 74 N. Y., 467; *Beckwith v. Union Bank*, 4 Sandf., 604, affirmed 9 N. Y., 24.

See *Martin v. Kunzmueller*, 10 Bosw. 16, 19, affirmed 37 N. Y., 396, 397; *Fourth, etc. v. City, etc.*, 68 Ill. 399.

In case of a deceased customer, a demand to be set off must have been due and payable from the decedent in his lifetime: *Jordan v. National Share, etc.*, 74 N. Y., 467.

In case of a debt not due, a banker's lien cannot extend to the money left on deposit with him according to the custom and usages of banks. Such lien is confined to securities and valuables which may be in the banker's custody as collaterals. The credit must be given on the faith of the securities or valuables, either in possession or expectancy: *Fourth, etc. v. City, etc.*, 68 Ill., 399.

Where securities are pledged to a banker or broker for the payment of a particular loan or debt, he has no lien upon the securities for a general balance or for the payment of other claims: *Wyckoff v. Anthony*, 90 N. Y., 448, affirming 9 Daly, 417; *Matter of Needew's Trust*, 26 Beav., 588; *Verderzee v. Willis*, 3 Bro. Ch., 21; *Jarvis v. Rogers*, 15 Mass., 389; *Lane*

Bailey, 47 Barb., 395; Morse on Banking (2d ed.), 42-50.

Personal property specifically pledged for a particular loan cannot, in the absence of a special agreement, be held by the pledgee for any other advance. Nor can it be so held, although the pledgees are bankers; the general lien which bankers hold on property deposited with them for a balance due on general account cannot be invoked: *Duncan v. Brennan*, 83 N. Y., 487, 491.

Where a customer presents a note to a bank for discount, which is refused, the bank cannot retain the note and insist upon a lien upon it. Bankers' liens only extend to such paper as it comes properly into the possession of, with the consent of the customer: *Petrie v. Myers*, 54 How. Pr., 513, 516-7.

An agreement in writing by a customer of a bank that, in consideration of its discounting for him and allowing an overdraft, it should have a lien on all securities belonging to him, which may be in its hands for discounts and overdrafts, gives no more than an ordinary banker's lien; and "securities" means securities given to the customer, and lodged by him in the bank, not securities—i.e., mortgages—given by the customer to the bank: *White v. London*, etc., 3 Vict. L. R. (Eq.), 83.

A bill of exchange specially indorsed, "Pay J. C. or order on account of B. G. & S.," was indorsed generally by J. C., sent by him to his correspondents, and paid by the drawees. J. C. failed about an hour before this payment was made, in debt to his correspondents, and this failure was known about an hour after payment made. His correspondents applied the amount of the payment to reducing their claim against J. C.

In an action by B. G. & S. against these correspondents to recover the amount of the payment:

Held, that the special indorsement showed that no consideration had been paid for the bill by J. C.; that it was notice to all subsequent holders that J. C. held the bill in trust for B. G. & S. for collection; that this trust followed the bill; and that neither J. C. nor his indorsees had any property in the bill.

Held, further, that the defendants not having paid the money over to J. C. before hearing of his failure, could

not apply it to reducing the debt owed them by J. C.

Held, further, that B. G. & S. were the real owners of the bill, and as such entitled to recover: *Blaine v. Bourne*, 11 R. I. Rep., 119.

The circumstances in the case at bar are entirely inconsistent with the lien of the plaintiff upon the drafts in suit for a general balance, and plaintiffs cannot hold or recover these drafts for a general balance of account after the specific advances made upon them have been paid.

When there is no existing right to detain the possession of the collateral after a specific loan upon it has been paid, no lien can exist upon it after payment. The right of a debtor to pay the advance, and *take up a collateral before its maturity*, is not reconcilable with the existence of a right in the creditor to hold on and keep the collateral, after the payment of such advance, for any general balance due him from the debtor for other indebtedness.

This action having been brought upon the acceptances, and no allegations nor any issue made therein claiming to recover them, because of this lien, for a general balance against the person who pledged them, the plaintiff cannot recover on any such ground, and the judgment must be reversed: *Grant v. Taylor*, 35 N. Y. Supr. Ct., 339.

As to lien by a bank on stock of its own stockholder, see 2 Bissell, 530 note; *Morawits on Private Corp.*, § 332, etc.

The policy of the law is to protect a *bona fide* vendee of shares of stock against secret equitable claims thereto of one who has endured the owner with the indicia of ownership; and a power to abridge the right of transfer will not be inferred for a statutory provision, unless it cannot otherwise have efficacy, and unless it presents so strong a probability of intention that the contrary cannot be supposed: *Driscoll v. West*, etc., 59 N. Y., 96, affirming 36 N. Y. Super. Ct. R., 488.

See *Walker v. Detroit*, etc., 11 N. W. Repr., 190.

One who takes in good faith and for a valuable consideration a transfer of shares in the capital stock of a corporation, is not bound to examine the books of a corporation, or look beyond the certificate assigned to him, to ascer-

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tain the validity of former assignments : Salisbury, etc., v. Townsend, 109 Mass., 115.

Under the general banking act of *New York* the stockholders had an unconditional right of transferring their stock, except as they agree to limit it by their articles.

A delegation, by the articles, to the board of directors, of the general powers of the association and the management of its stock, does not authorize a by-law subjecting the stock to a lien in favor of the bank for the indebtedness of the stockholder : Bank of Attica v. Manufacturers, etc., 20 N. Y., 501.

But see in *Rhode Island*, Lockwood v. Mechanics, etc., 9 R. I., 308.

So as to a manufacturing corporation : Driscoll v. West, etc., 59 N. Y., 96, affirming 36 N. Y. Supr. Ct. R., 488, distinguishing Leggett v. Bank of Sing Sing, 24 N. Y., 28; McCready v. Rumsey, 6 Duer, 574; Arnold v. Suffolk Bank, 27 Barb., 424.

The legislature cannot confer upon a moneyed corporation power to enact by-laws contravening, repealing, or in anywise changing the statutory or common law of the land. Hence, a provision in a bank charter, conferring upon the directors power to make and prescribe such by-laws, rules and regulations as shall be needful, touching "the time, manner and terms upon which discounts and deposits shall be made," will be construed as giving to the directors power to make by-laws, etc., to operate upon and control the internal conduct of the business of the bank merely, and to restrain and direct its own officers and servants in the management of its affairs, and not to affect the public at large, or the rights and interests of third persons : Bank v. Lamb, 26 Barb., 595.

A provision in the articles of a banking association, that the shares of its stock shall not be transferable until the shareholder shall discharge all debts due by him to the association is valid, and creates a valid lien as against an assignee of the stock : Leggett v. Bank of Sing Sing, 24 N. Y., 283; Sewall v. Lancaster, etc., 17 Serg. & R., 285; Knight v. Old, etc., 3 Cliff., 427; Union, etc., v. Laeford, 2 Wheat., 393; Brent v. Bank, 10 Pet., 615.

And applies to a liability which has

not matured : Leggett v. Bank of Sing Sing, 24 N. Y., 283.

If a debtor to a bank which has a lien on his stock owes less than the value of it, the bank may hold the whole till that debt is paid; it is not obliged to appropriate part and transfer the rest : Sewall v. Lancaster, etc., 17 Serg. & R., 285.

A bank agent, being about to make advances on the security of certain stock of another bank, applied to the bank officers to ascertain what claim the bank held against such stock, where he was informed that there was over due paper to the amount of \$500; but before completing the arrangement to the transfer of the stock another claim, which was then current in one of the agencies of the bank, was returned unpaid; held, that the bank had a right to retain its lien on the stock for the additional sum, before allowing the transfer of the stock to be carried out in their books. The ownership of bank stock being about to assign the same, procured from one of the agencies of the bank a memorandum on the back of a power of attorney for the transfer of the stock in the words "No liability at Galt office." Held, that this was not such a representation made to the intending transferee as bound the bank; and the bank was entitled to hold the stock for the amount of a draft of \$550 which had been discounted at the Galt office, and then in the hands of an agency in Montreal : Cook v. Royal, etc., 20 Grant (U.C.) Chy., 1.

Loans by national banks to the stockholders do not give a lien to the bank on the stock of such stockholders : Bank v. Lanier, 11 Wall., 369; Bullard v. Bank, 18 Wallace, 58 Second, etc., v. National, etc., 10 Burdett (Ky.), 367; Evansville, etc., v. Metropolitan, etc., 2 Biss., 527, 530 note.

But see Knight v. Old, etc., 3 Cliff., 429, 433; Young v. Vough, 23 N. E., 325, affirmed 24 id., 535; Lockwood v. Mechanics, etc., 9 R. I., 308.

Even though the certificate of stock contain a provision that the stock not transferable until all the indebtedness of the stockholder to the bank is paid : Conklin v. Second, etc., 45 N. Y., 655.

National banks, as governed by the National Currency Act, of June 3

1864, which act repeals the National Currency Act of 1863, can make no valid loan or discount on the security of their own stock, unless necessary to prevent loss on a debt previously contracted in good faith. The placing by one bank of its funds on permanent deposit with another bank, is a loan within the spirit of this enactment: *Bank v. Lanier*, 11 Wall., 369; *Conklin v. Second*, etc., 45 N. Y., 655.

A transfer of stock valid as between parties, but consummated in the form required by law—i. e., by entry upon the book of registry of stockholders—does not divest the transferrer of liability as a stockholder to the creditors of the corporation: *Schellington v. Howland*, 53 N. Y., 371, affirming 67 Barb., 14; *Brown v. Hitchcock*, 36 Ohio St. R., 667.

See *Ex parte Hall*, 1 MacNaghten & Gord., 307.

Though, as between vendor and vendee, the vendee is bound to indemnify the vendor: *Johnson v. Underhill*, 52 N. Y., 203; *Brown v. Hitchcock*, 36 Ohio St. R., 667.

See *Ex parte Hall*, 1 MacNaghten & Gord., 307.

Where the by-laws of a bank require transfers to be entered on its books in the presence of its president or secretary, and declaring a lien in favor of the bank on the stock of any shareholder who is indebted to it, while a legal title to stock can only be transferred in the mode prescribed, a complete equitable title may be otherwise acquired entitling the transferee to demand that he be invested with the legal title: *Johnson v. Underhill*, 52 N. Y., 203; *Planters*, etc., *v. Selma*, etc., 63 Ala., 585; *Black v. Zacharie*, 3 How. U. S., 483; *Cady v. Potter*, 55 Barb., 463; *Hill v. Newhawanick Co.*, 48 How. Pr., 427; *Driscoll v. West*, etc., 36 N. Y. Supr. Ct. R., 488, 59 N. Y., 96; *Bank v. Lanier*, 11 Wall., 369; *Brown v. Adams*, 5 Bissell, 181.

One who has subscribed for, or purchased, a certain number of shares of the capital stock of a bank, and paid for the same, cannot maintain an action for money had and received, against the bank, on the ground that the bank has refused to deliver to him certificates of such stock, and is there-

fore bound to repay him the money so paid for the stock.

But if a bank improperly refuses to permit a transfer of stock to be made upon its books, or to issue certificates of such stock, an action of assumpsit will lie, on the ground that it is the duty of the bank to permit such transfer and to issue certificates; and that where an obligation is imposed by law upon a corporation, a promise of performance will be implied: *Arnold v. The Suffolk Bank*, 27 Barb., 424.

A stockholder may expressly charge his stock with a lien for an unpaid balance against him: *Butterworth v. Kennedy*, 5 Bosw., 143.

Though the charter of a bank provide that it shall have a lien on the stock of a stockholder for all his indebtedness to it, after he has divested himself of title thereto and the bank has notice thereof, it cannot extend credit to him upon the faith of this charter lien: *Bank v. McNiel*, 10 Bush (Ky.), 54.

Though the by-laws of a bank provide that it shall have a lien upon the stock of a stockholder for all his indebtedness to the bank, the corporation may lose its right to enforce such lien by laches or the acts of its officers: *National Bank v. Watson Com. Bank*, 105 U. S. R., 217.

A bank is not bound to transfer its stock to an assignee until the stock is fully paid for: *McCready v. Rumsey*, 6 Duer, 574, 21 How. Pr., 271.

But see *Kahn v. Bank St. Joseph*, 70 Mo., 262.

As to the right of a bank to set off a demand in its favor against a deposit, or of a depositor to set off against a demand held against him by the bank, 26 Eng. R., 140.

Where a depositor in a bank is indebted to the bank by bill, note, or other independent indebtedness, the bank has the right to apply so much of the funds of the depositor to the payment of his matured indebtedness as may be necessary to satisfy the same. So, where a bank held the note of a depositor for a certain sum, the bank could, on the morning of the last day of grace upon such note, apply to its payment any money of the depositor then remaining on deposit in such bank: *Home National Bank v. Newton*, 8 Bradw. (Ills.), 563.

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London Chartered Bank of Australia v. White.

J.C.

A voluntary assignee for benefit of creditors may maintain an action for proceeds of the assigned estate deposited in the assignor's name, after the assignment, without notice to the bank.

The relationship between a bank and its depositor is that of debtor and creditor. A bank may retain money in its hands on deposit as set-off against notes of the depositor held by it, not matured at the date of the assignment: *Greene v. National, etc.*, 13 Phila., 146.

The capital stock of a corporation, whether fully paid or partly outstanding in the hands of subscribers thereto, is a trust fund for the benefit of creditors.

The board of directors of an insolvent bank having duly made an assessment on unpaid stock subscriptions for the purpose of meeting the liabilities of the bank, a depositor cannot set off the amount due him, on account of his deposit, against the amount of assessment due by him on account of unpaid stock subscriptions: *Macungie Savings Bank v. Bastian*, 10 Weekly Notes Cas. (Penn.), 71; distinguishing *Fox's Appeal*, 8 W. N. Cas. (Penn.), 556; *Jordan v. Sharlock*, 84 Penn. St. R., 366.

A depositor in an insolvent savings bank, who is also a debtor to the institution for money borrowed, is not entitled to set off the amount of his deposit against his indebtedness. The ordinary rules of set-off between debtor and creditor do not apply to the case.

The giving of the depositor credit for the amount of the loan on the books of the bank, the same being entered on her pass-book and remaining, subject to her check, for a long time before the bank closed its doors, was an actual payment of the money to her. And she is not entitled to a deduction from her indebtedness of so much of the borrowed money as remained on deposit when the bank suspended payment: *Hannon v. Williams*, 34 N. J. Eq., 255.

The firm of R. Bros., ship brokers, having become embarrassed in business, caused the moneys thereafter received by them in their business, as agents for others, to be deposited with defendant in the name of their book-keeper, plaintiff's intestate, in order to protect such funds from being attached by their creditors, and that they might be paid over to the parties entitled thereto. Defendant having discounted a note for

said firm, when it became due, charged it to said account and refused to pay over the amount so deducted to plaintiff. In an action to recover the amount so retained, held, that defendant was not entitled to set off the amount of the note against the deposits, as the deposits were not the property of R. Bros. but were deposited and held in trust for the benefit of those for whom the moneys were received.

Also held, that it was immaterial that none of the parties entitled to the deposits had made claim therefor, as they could enforce their claims against the plaintiffs.

Also held, that it was immaterial that defendant was not notified that said intestate so held the funds in trust; that the deposits being in his name, he was under no obligation to give notice that others had an interest therein.

Also held, that the discharge of R. Bros. in bankruptcy did not affect the rights of the parties, for whose benefit these deposits were made; that such discharge, while it might destroy their claims against them, did not deprive those for whom the funds were deposited of their right thereto: *Falkland v. St. Nicholas National Bank of N. Y.*, 84 N. Y., 145, reversing 21 Hun, 458.

Plaintiff made a deposit with the F. & M. Bank, receiving therefor a certificate payable to his order, on return thereof, with interest. While the certificate was outstanding, that bank discounted plaintiff's note in renewal of former note held by it; and in the ordinary course of business, and for valuable consideration, indorsed and transferred the note to defendant, the A. C. N. Bank, before maturity, said defendant receiving it in good faith and in ignorance of such deposit. The A. C. N. Bank then held certain securities as collateral for all paper so transferred to it by said F. & M. Bank. At the time of the transfer the latter bank was solvent, but thereafter was adjudged a bankrupt, and defendant, McLeod, was appointed assignee. Plaintiff's note was duly protested and the F. & M. Bank charged as indorser. The A. C. N. Bank still held some of the collaterals; plaintiff advised it of his deposit, and asked that it avail itself of the collateral securities for his benefit to the amount of the note; this it refused.

fused to do, but surrendered the securities to McL., taking from him a guaranty of the collection of the note. No demand for payment of the certificate was made of the F. & M. Bank before it was adjudicated a bankrupt.

In an action brought to compel the application of the securities to the payment of the note, held, that plaintiff was not entitled to the relief sought; that no right of set-off, either legal or equitable, existed at the time of the transfer of the note; and that the legal rights of the A. C. N. Bank were not so affected by subsequent equities, arising out of the changed relations of plaintiff and the F. & M. Bank, as to require it to first resort for payment to the securities in exoneration of plaintiff; also, that the other creditors of the F. & M. Bank stood equal in law and in equity with plaintiff, and the A. C. N. Bank was bound to regard their interests as well as his.

Also held, that no right of set-off arose under the Federal Bankrupt Act. There is no right of action upon a certificate of deposit in ordinary form issued by a bank, until demand of payment: *Smith v. Felton*, 43 N. Y., 419; *Colgrove v. Tallman*, 67 id., 95, distinguished.

It seems, that a "mutual credit" is a knowledge on both sides of an existing debt due to one party and a credit by the other party, founded on and trusting to that debt as a means of payment: *Munger v. Albany City National Bank*, 85 N. Y., 580.

A receiver of an insolvent bank has no power to allow a set-off against a debt owing to the bank, where the demand sought to be set off was assigned to the debtor for that purpose after his appointment; and what the receiver cannot thus do directly, cannot be done by way of ratification or waiver.

Where, therefore, in an action by a receiver, upon a demand due the bank, the defendant sought to set off certain checks drawn in his favor by depositors, which the referee found were not delivered to the bank and credited to defendant's account, until after the service of an injunction order issued in the proceedings for the appointment of the receiver, restraining the officers of the bank from further action or interference with its assets. Held, that the retention of the checks by the receiver was not a ratification of the act of the bank officer in receiving them, and that the set-off was properly disallowed: *Van Dyck v. McQuade*, 85 N. Y., 616.

[4 Appeal Cases, 448.]

H. L. (E.), May 15, 1879

[HOUSE OF LORDS.]

*SARAH SMITH MORTIMORE, *Appellant*; and HARRIET ANNE MORTIMORE, *Respondent* (¹). [448]

Will—Time for ascertaining "Next of Kin" under the Statute of Distributions.

A testator, who had four daughters, divided a fund into four equal amounts, giving one to each daughter and her children; but when one died and left no child the interest was to be paid to the others, and after the death of the last survivor the fund was to be divided among her children; "or if there be no such children, that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the statute for the distribution of intestates' estates." One of the daughters left issue, the others had no issue. On the death of the last daughter:

Held, that under the words of the will the class of "next of kin" described the persons who filled that character at the time of the death of the testator, and not at the death of the last surviving daughter; and that the shares of the daughters who had died without issue were divisible among the persons representing the four daughters.

Bullock v. Downes (²) followed.

(¹) Affirming 23 Eng. R., 611.

(²) 9 H. L. C., 1.

JOHN CLARKE, by his will, dated the 11th of May, 1825, bequeathed to trustees £12,000 in consols, in trust as to £3,000 part thereof, to pay the income to his daughter, Sarah G. Clarke, for life for her sole and separate use, and, if she should marry and have issue, to her children after her decease: if but one child, then to such only child. "And in case my said daughter Sarah G. Clarke shall die without leaving issue her surviving, then I will and direct that the interest and dividends of the said sum of £3,000 consols be paid and divided to, and among, such of my said other daughters as shall then be living, and to the survivor or survivors whether single or married, but to and for their sole and separate use and benefit. And from and immediately after the decease of my last surviving daughter, that the said sum of £3,000 consols be paid and divided to and among the child or children of any such last surviving daughter; and if there shall be no such children, that the sum be paid to such 449] person or persons as will *then be entitled to receive the same as my next of kin under the statute for the distribution of intestates' estates."

The testator had three other daughters, Rebecca, Mary, and Frances, and trusts in the same words were created with respect to each of them and their children, with the same limitation over in default of children of such daughters respectively. His residuary estate, subject as to £1,000 to a power of appointment given to his wife, was directed to be held by the trustees on the same trusts as the £12,000 consols.

The testator died in 1838, leaving all his daughters him surviving. They were his sole next of kin.

Rebecca married Charles Cunningham Young, and died in 1839, leaving, as her only surviving child, a son, Thomas Young.

Sarah died in 1851, unmarried.

Mary died in 1872, having been married but leaving no child.

Frances died in 1875, unmarried.

On the death of Frances the question arose whether the persons entitled to the three legacies as "next of kin" were those who were next of kin to the testator at the time of his death, or next of kin at the time of the death of Frances, the last surviving daughter.

The appellant was the sole legal personal representative of Thomas Young, who had survived Frances, the last of the daughters, and she claimed as being, upon the death of Frances, the sole next of kin of the testator.

The respondent was the sole legal personal representative

of Frances, and, as such, claimed as the next of kin of the testator at the time of his death, and brought an action in the Chancery Division to have the rights of the parties ascertained and declared.

On the 29th of May, 1877, Vice-Chancellor Bacon made a decree declaring Thomas Young entitled to the trust funds as the sole next of kin of the testator living at the death of Frances, on whose death the Vice-Chancellor was of opinion the character of "next of kin," within the words of the will, was to be determined. On appeal this decree was on the 8th of December, 1877, reversed, and it was declared that the persons who, on the death of Frances, were entitled to the trust fund, were the next of kin of the testator at the time of his death (*).

*Mr. *Everitt*, for the appellant: Wills must be [450 construed according to the plain intention of the testator. The intention here was to provide for several contingencies, but at the end of them all, to give the property to the persons who should, when those contingencies came to an end, be the next of kin of the testator. There was no technical idea in the mind of the testator that, when all his particular provisions had failed, the question of who were his next of kin was to be referred back to a distant period, to ascertain who filled that character at the moment of his own death. He might not really anticipate that all his special provisions would fail, and no doubt hoped that they would not, but he put that final clause into his will to meet the improbable, though of course not impossible, contingency, that they might do so. If that improbability should occur, he desired that it then should be decided who were, at that time, his next of kin. He did not, as had been done in some of the cases, suggest his own death and intestacy. *Long v. Blackall* (*) favors such a construction; and so does *Jones v. Colbeck* (*); and in *Butler v. Bushnell* (*), which was very like this case, the persons who were the testator's next of kin were to be ascertained, not at his death, but at the death of his daughter. The case of *Bullock v. Downes* (*) is not decisive of the present, but is distinguishable. There the time of the testator's death was distinctly indicated as that at which the class was to be ascertained. Here it is not; but, on the contrary, the testator suggests the death of the last daughter as the time. In *Bullock v. Downes* the words were, "in trust for such persons of the blood of me as would by virtue

(*) *Nom. Mortimer v. Slater*, 7 Ch. D., 322; 23 Eng. R., 611.

(*) 3 Ves., 486.

(*) 8 Ves., 38.

(*) 3 My. & K., 232.

(*) 9 H. L. C., 1.

of the statute of distributions of intestates' estates have become and been then entitled thereto, in case I had died intestate." There the reference to his own death and intestacy fixed the date. Here the death spoken of is that of "my last surviving daughter," when the fund is to be paid "to such person as will then be entitled to receive the same as my next of kin under the statute." Connecting these two phrases together, it was clear that the testator contemplated the next of kin as those who would be so on the death of his last surviving daughter. All the cases showed that, 451] in the *construction of such a bequest, the intention of the testator must govern. *Briden v. Hewlett* ⁽¹⁾ did so, and there the mother of the testator having died after him, the testator's next of kin at her death were held entitled. In *Wharton v. Barker* ⁽²⁾ the same principle was adopted; and in *Lees v. Massey* ⁽³⁾ the Lord Chancellor took the death of the testator's daughter as the period for ascertaining the next of kin, and both the Lord Chancellor and Lord Justice Turner declared that in such cases the intention of the testator furnished the governing principle. Here it is submitted that the intention of the testator clearly applies to the death of his last surviving daughter, and that the decision of the Vice Chancellor ought therefore to be restored.

Mr. Kay, Q.C., and Mr. Renshaw, for the respondents, were not called on to address the House.

THE LORD CHANCELLOR (Earl Cairns): My Lords, I am bound to say, in the first place, that it appears to me that this case is absolutely undistinguishable from the case of *Bullock v. Downes* ⁽⁴⁾; indeed, it is seldom that you find with regard to wills two cases so much resembling each other, and if your Lordships were to arrive at the conclusion at which Vice-Chancellor Bacon has arrived, it would be tantamount to overruling (if your Lordships could overrule it) that decision. But, my Lords, apart from that authority, which of course is a paramount authority, it being a decision of your Lordships' House, it appears to me that if you had, in the first instance, to consider the construction of this will, it would on principle, and on the authorities which preceded *Bullock v. Downes*, be impossible to come to any other conclusion. In the words of this particular will there is a gift to a class of persons who are thus described, "my next of kin under the statute for the distribution of intestates' estates." That is a class which, according to the statute, must be ascertained at the death of the testator;

⁽¹⁾ 2 My. & K., 90; 1 L. J. (Ch.), 119.

⁽²⁾ 3 De G., F. & J., 113.

⁽³⁾ 4 K. & J., 483.

⁽⁴⁾ 9 H. L. C., 1.

and, as I took the liberty to mention during the argument, it is not an artificial class of next of kin to be created. The *only other words are "that the same be paid to such [452 person or persons as will *then* be entitled to receive the same." Now, I am quite willing to look at the word "then" as if it meant at the expiration of the preceding limitation, but then what does this amount to? Why this. At the expiration of the preceding limitation you are to find out the hands into which you are to pay the money, but you must do that by first ascertaining who were his next of kin at the time of his death.

Therefore, my Lords, apart from authority, it appears to me that the decision of the Court of Appeal would be right, but founded, as it properly was, on the authority of the case of *Bullock v. Downes*, it appears to me that that decision cannot be upset. I therefore submit to your Lordships, and move your Lordships that the appeal should be dismissed, and unless some arrangement has been made of a different character it must be dismissed in the ordinary way with costs.

LORD HATHERLEY: My Lords, I do not think it necessary to occupy your Lordships by saying anything on this case, for I really consider it precisely the same as the case of *Bullock v. Downes* ('). Every will, of course, must have its different expressions, and in each case every word must be minutely scrutinized; but when the whole of this will is read, it appears to me that the case of *Bullock v. Downes* must govern this case, and that case having been decided, we ought not to depart from it now.

LORD O'HAGAN: My Lords, I am quite of the same opinion, and I can add nothing to the observations of my noble and learned friends. I think the case of *Bullock v. Downes* is wholly undistinguishable from that which is now before your Lordships. I am also of opinion that if *Bullock v. Downes* had never been decided at all, we should arrive in this case at the same conclusion. The will appears to me to be clear enough. The testator gives certain properties, pointing to the future, and makes a devolution of them *through various stages, and at the end of all, and [453 when all are exhausted, provides that the property shall go to "my next of kin under the statute for the distribution of intestates' estates." That plainly means the next of kin who, at the time of his death, would have been entitled, if he had not made any will.

(') 9 H. L. C., 1.

LORD BLACKBURN: My Lords, I am of the same opinion. I think the present case is quite undistinguishable from the case of *Bullock v. Downes* ⁽¹⁾; and having said that, I have said really quite enough, for *Bullock v. Downes* is, I apprehend, binding upon your Lordships as much as upon an inferior court. I may farther say, however, that I am quite inclined to agree with what my noble and learned friends have said before me, that if *Bullock v. Downes* had never been decided at all, I should have decided this case the same way; indeed, I think it is even a clearer case than *Bullock v. Downes*.

LORD GORDON concurred.

Decree appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 15th May, 1879.

Solicitor for the appellant: *John Watson*.

Solicitor for the respondent: *Charles Langley*.

⁽¹⁾ 9 H. L. C., 1.

See Farwell on Powers, 415; Wingfield v. Wingfield, 26 Eng. R., 416.

The rule with regard to legacies to a class of persons is, that those only who are embraced in the class at the time the legacy takes effect, will be allowed to take.

But where a legacy of that kind takes effect in point of right at one time and in point of enjoyment at another, the general rule is that all those will take who are embraced in the class at the time the legacy takes effect in point of enjoyment.

A testator gave certain property to his son for life, and after his death to his children equally. When the testator died, the son had a wife 59 years of age and three adult children; but the wife afterwards died and the son married again, and had two more children, who were living at his death. Held, that these children were entitled to the property given by the will: *Matter of Jones's Appeal*, 48 Conn., 60.

A will which provides that "after the death of testator's daughter, he gives her children and grand children," etc., contemplates descendants then unborn, who shall be in being at the time of the daughter's death: *Cheever v. Washtenaw*, etc., 45 Mich., 6.

A testator, after devising the residue

of his real estate to his daughters and the survivor of them until death or marriage, provided that, "after the marriage or death of my surviving daughter taking under this item, the estate herein devised shall descend to those persons who may then be entitled to take the same as my heirs": Held, that the devise over was to those who were the heirs of the testator at the time of his death: *Dove v. Torr*, 128 Mass., 38.

The will of W. gave all of his real estate to his son J. for life, and in fee, in case his son married and had issue. If he died without having had lawful issue, the will directed the executor or executors then surviving to sell said real estate, and distribute the proceeds among the testator's "next of kin of personal estate, according to the laws of the State of New York, for the distribution of intestate personal estate." The executors named were J. and two others. At the testator's death, he left J., four nieces and a nephew, surviving. J. died without having had lawful issue; the other two executors were then dead, the four nieces also died during the lifetime of J., leaving children. In an action brought by the nephew for a construction of the will, and the appointment of a trustee to carry out its unexecuted provision,

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held, that the will created a general power in trust, the execution whereof was imperative (1 R. S., 732, §§ 74, 77; 734, §§ 94, 96); that upon the death of the surviving trustee, his powers and duties became vested in the court, and might be exercised by some person appointed by it for that purpose (1 R. S., 734, § 102; Id., 730, § 68);

also, that as the gift was money, and the direction for conversion absolute, the "next of kin" to whom the proceeds of the real estate were to be distributed, were those who were such at the time of distribution, i.e., at the death of J., and that therefore plaintiff was entitled to all of said proceeds: *Dolaney v. McCormack*, 88 N. Y., 174.

[4 Appeal Cases, 454.]

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[HOUSE OF LORDS.]

***OWEN ELIAS, WILLIAM ELIAS and Others, *Appellants*; and THE SNOWDON SLATE QUARRIES COMPANY, and THE WEST SNOWDON SLATE COMPANY, *Respondents* (').**

Mines—Quarries—Term of Years—Reversioner.

A termor of land, with no grant of a power to work quarries on the land, cannot open any in order to work them; but if the quarries have been worked before the commencement of the term, he may continue the working.

The owner of land demised it in 1802, by way of mortgage, for a term of 500 years at a peppercorn rent. A quarry, called the lower quarry, appeared to have been then open on the land, and had been worked by the mortgagor. In 1820, the mortgagee foreclosed the equity of redemption, and took possession of the property, and worked not only the lower quarry, but another, which received the name of the upper quarry. In 1873 the plaintiff, the reversioner of the term of 500 years, having, not long before, become acquainted with the fact that he was the reversioner, filed a bill to restrain the termor from working the quarries and for an account. At the trial the great dispute of fact was as to the time when the upper quarry had been opened. Vice-Chancellor Hall had thought that it was not shown to have been opened in the time of the mortgagor, and so granted, as to that, an injunction and account. The Court of Appeal came to a different conclusion on the evidence and dismissed the plaintiff's bill. On appeal to this House the decision of the Court of Appeal was upheld.

Where the lease of a quarry reserves, not the payment of a fixed sum by way of rent, but a share of the profits of the quarry, it is to be treated as opened for purposes of commerce.

The consideration of the facts and circumstances of a case must determine on whom the *onus* lies of showing when a mine or quarry was first opened for working.

A mine or quarry opened by the owner of the inheritance, while he was still in actual possession, even though after the date of the mortgage, will enure for the benefit of the mortgagee.

Per LORD SELBORNE: Where a mine or quarry has been opened for a restricted or definite purpose, as to obtain fuel, or the means of repairing a particular tenement on the estate, that would not give a tenant for life, or other owner of an estate impeachable for waste, the right to work it for commercial profit. But when a mine or quarry is once open, so that the owner of an estate impeachable for waste, may work it, the sinking of a new pit on the same vein, or the breaking ground in a new place on the same rock, is not, *necessarily*, the opening of a new mine or a new quarry.

(') Affirming 25 Eng. R., 446.

ROBERT BULKELEY OWEN was the owner in fee simple of a farm called Fridd-Issan, in the parish of Beddgelert in 455] North *Wales. He borrowed a sum of £400 from Morris Griffith in 1802, and by way of mortgage security demised the farm to Griffith, his executors, administrators, and assigns, for a term of 500 years, at a peppercorn rent. He afterwards borrowed a farther sum of £800, and in September, 1810, charged the same with interest upon the mortgaged premises. The premises were situated partly at the base, and partly on the slopes of Snowdon. In 1808 Owen granted a lease of the farm, and in 1811 a lease for twenty-one years of the mines and slate quarries under the whole property. In 1816, Griffith brought an action of ejectment to obtain possession of the farm, and recovered judgment in the action in 1818. He also instituted a suit for foreclosure, and obtained a decree thereon in 1820. He thus became possessed of the whole property, and in 1830 seemed to have made an attempt to work for the slate. He died in 1835, and the property passed to his widow, to his son John Griffith, and then to his son William Morris Griffith, who was originally a defendant in this suit. In May, 1847, John Griffith made a lease of the farm in question with liberty to search for and get slate, &c., under the said tenement, and this lease passed to the "Snowdon Slate Quarries Company," and on the winding-up of that company, was sold by the liquidator to the "West Snowdon Slate Company." In the course of the proceedings in this sale, namely, in December, 1872, an objection to the title was taken, and in consequence a letter was written to the present appellants—the persons who appeared to be the reversioners after the expiration of the term of 500 years—and they, in May, 1873, filed their bill against W. M. Griffith complaining of the working of the quarries as waste, and asking for an injunction to restrain farther working, and for accounts, and for farther relief. This bill was afterwards amended by making the two companies parties to the suit.

The various defendants put in answers which in substance set forth the facts already stated, and relied on them for a defence, and they also alleged that the quarries were open working quarries upon the lands comprised in the demise and mortgage of 1802. Whether the upper quarry was so, was the matter really in dispute, and on that a great deal of evidence was given. Its effect is fully stated in the judgments.

456] *Vice-Chancellor Hall was of opinion that the lower quarry had been open before the demise of 1802, but "that

neither the mortgagor nor his lessees, while he remained in possession, opened a quarry elsewhere on the mortgaged premises," and therefore, as to the upper quarry, he granted the prayer of the bill for an injunction and account, but dismissed it as to the lower quarry ('). On appeal the Lords Justices came to a different conclusion on the evidence, reversed the decision, and ordered the bill to be dismissed with costs (*). This appeal was then brought.

Mr. *Osborne Morgan*, Q.C., and Mr. *Ford North*, Q.C. (Mr. *Edward Rolland* was with them), for the appellants: They stated the facts of the case with great minuteness, and insisted that there was no evidence to warrant the conclusion that the owner of the inheritance ever worked both mines or quarries with a view to profit—or had ever authorized them to be so worked—and especially it was clear that there had not been, by him, such working of the upper quarry before the mortgage demise. Assuming the fact to be so, then the conduct of the respondents in working both of them was without warranty in law. They were mere termors, and as such their working the mines or quarries amounted to voluntary waste, from the committing of which the court would, upon equitable principles, restrain them. There had not been any laches here, and the appellants proceeded as soon as they were aware of their rights: *Moyle v. Mayle* ('); *Coppinger v. Gubbins* ('); *Purcell v. Nash* ('); *Mansfield v. Crawford* ('); *Viner v. Vaughan* ('); *Jegon v. Vivian* ('); *Countess of Salop v. Crompton* ('); *Goodson v. Richardson* ('); *Whitfield v. Bewit* ('); *Bays v. Bird* ('); *Saunders's Case* ('); *Clegg v. Rowland* ('); *Vyryan v. Vyryan* ('); *Browne v. McClinlock* (') were cited.

*Mr. *Dickinson*, Q.C., and Mr. *Bradford*, for the [457 Snowdon Slate Quarries Company.

Mr. *Horne Payne*, and Mr. *C. H. Turner*, for the West Snowdon Slate Company.

Mr. *Dickinson*, and Mr. *Horne Payne*, addressed the House: It was a maxim of the law of England to give effect to what had been done for a series of years, and done with

(') *Nom. Elias v. Griffith*, 8 Ch. D., 521; 25 Eng. R., 446, where the facts are fully detailed.

(') *Ibid*, 531; 25 Eng. R., 446.

(') *Owen*, 66.

(') 8 J. & Lat., 397.

(') 1 Jo. Ir. Eq. R., 625; 2 Id., 117.

(') 9 Ir. Eq. Rep., 271.

(') 2 Beav., 466.

(') Law Rep., 6 Ch. App., 742.

(') *Cro. Eliz.*, 777, 784.

(¹⁰) Law Rep., 9 Ch. App., 221; 8 Eng. R., 836.

(¹¹) 2 P. Wms., 240; see also 3 P. Wms., 267.

(¹²) 2 P. Wms., 397.

(¹³) 5 Co. Rep., 12.

(¹⁴) Law Rep., 2 Eq., 160.

(¹⁵) 30 Beav., 65; 4 D. F. & J., 183.

(¹⁶) Law Rep., 6 H. L., 456; 8 Eng. R., 52.

the knowledge of those who had the power, if they had the will, to prevent it, but who allowed it to be done without offering the least objection to it. That had been the case here, and the present claim of the plaintiffs was therefore answered.

The evidence here was sufficient to satisfy the judges of the Court of Appeal that both quarries were open before the respondents went into possession of the premises, and they were therefore entitled to work them.

The cases cited on the other side were commented on, and the following were also referred to: *Gibson v. Doeg*(¹); *Bulley v. Bulley*(²); *Wolfe v. Birch*(³); *Clavering v. Clavering*(⁴).

Mr. Osborne Morgan replied.

THE LORD CHANCELLOR (Earl Cairns): My Lords, the argument of this case has occupied at your Lordships' bar a considerable time, but the result of that argument is that every fact in the case has, I think, been brought with great clearness before your Lordships' attention, and I shall be able in a very short space to submit to your Lordships the view which I at least take of the case now presented to us.

My Lords, I will in the first place remind you of the mortgage title. That starts in the year 1802, when the mortgage was made by Owen, the then owner of the inheritance, to Griffith, for 500 years, and I pass over as immaterial the farther charge which took place a few years afterwards. From 1816 to 1820 proceedings were going on for foreclosure 458] of this mortgage. In *the course of those proceedings, namely, in 1818, Griffith appears to have entered into possession, and the proceedings were terminated by complete foreclosure in 1820. From that we pass on, still only dealing with the mortgage title, till 1847, when a lease was made by a son of this Griffith to three persons for the purpose of adventuring in, and continuing to work, mines or quarries upon the property, and under that lease the present respondents claim.

Now, turning on the other hand to the title to the inheritance, that continued in the mortgagor Owen up to the time of his death in 1837; therefore from the complete foreclosure in 1820, for seventeen years, he (the mortgagor) was in existence and was the owner of the inheritance of the property in fee simple. He died in 1837, and was succeeded by Rice Owen, his heir, who continued in life until 1860, a

(¹) 2 H. & N., 615.

(³) Law Rep., 9 Eq., 683.

(²) Law Rep., 9 Ch. App., 739; 10 Eng. R., 706.

(⁴) 2 P. Wms., 388.

period of forty years from the foreclosure. When he died in 1860, the inheritance fell to one of the present appellants.

That being the title to the mortgage term on the one hand and to the fee on the other, let me remind your Lordships in a few words of the actual facts which are proved with regard to the opening of the slate quarries upon the property. And I must first observe with regard to these facts, that, whatever may be their proper description, there is no controversy as to them, because they are facts which come from the witnesses on the one side only, in their evidence in chief, and in their cross-examination; and although criticisms may be made as to the limited extent to which these witnesses speak, there is nothing which shakes their credibility or their accuracy so far as they do speak.

My Lords, it is sufficient for my present purpose that I should state what I am about to state as to their evidence. Their evidence appears to me to amount to this, that in 1812 and 1814 (upon the evidence of witnesses old enough to remember those years), there were open quarry holes or quarries, whichever may be the proper word, in the *locus in quo*, that is to say, the land subject to this mortgage. It is a question upon the evidence, what the size of the openings was, but that has been left as it is upon the evidence to which I have already referred, the evidence of one side. No evidence has been contributed from witnesses equally old, or from *any witnesses at all, upon the other [459] side. The witnesses, it is true, do not pretend to speak with certainty upon the exact size of the openings, but in a mineral country where the terms may be supposed to be well known and persons accustomed to use the terms proper to describe what actually is in existence, these witnesses all, without exception, speak of that which existed upon the property as what they would describe as open workings, and they are careful to say that they were workings which for some purpose were actually worked; for they saw certain slates taken out of them and pressed and laid on one side, and the *debris* in other places, which would show that slates had been taken out and worked. That evidence is added to by the evidence of another witness who speaks with very considerable accuracy of what he saw in 1818. What he saw then was working of the same description; it may have occurred between 1812 and 1818, or it may have been the same working which the other (the older) witnesses saw in 1812. Then passing on to 1825, or thereabouts, your Lordships have clear testimony of working of a very much more extensive description at that time. I say "more extensive,"

because it appears to me the witnesses agree in saying it was carried on by a number of persons who were acting upon a system, and for some purpose or other, who were acting as a company, or as persons engaged in a common undertaking, for the purpose of either trying or carrying on the works.

Now that being the character of the evidence which is the only evidence in the case, of course it would have been perfectly competent for any person interested to show that the working, such as I have described it to be, took place without the knowledge, and without anything that could be called consent or authority on the part of the owner of the inheritance. Nay more, it might have been shown that the workings were actually workings by way of trespass, and had not even the consent of the termor, the mortgagee; or it might farther have been shown that those workings were not workings of the ordinary kind for the purpose of commerce, for the purpose of disposing of that which was gained; but were workings for what I may call home consumption, for some ordinary purpose with reference to the farm on which the workings took place. Any one of those things might 460] have been shown, but no *one of them has been shown in opposition to the evidence which I have referred to, and that evidence stands, *valeat quantum*, without any counter evidence for the purpose of putting a complexion upon the character of the working which I have mentioned.

That being the state of things, then, we proceed a step farther, and your Lordships find this important element introduced into the case. It is proved without contradiction, and even I may say without controversy, that in 1811, after the mortgage had been made, for that was made in 1802, but while the mortgagor was still in possession of the property, and was representing the property, and was for all practical purposes, in accordance with the sense in which the word is commonly used, in ownership of the property, living upon, at all events exercising the ordinary acts of ownership over, the property, he made a lease covering the land subject to the mortgage. I pass by the lease of 1807. What is stated in that lease of 1811 is, that it was a lease from Robert Bulkeley Owen to Richard Owen, Hugh Hughes, and Richard Henry Davys, of slate rocks and beds of slate, and all mines, &c., from that date for twenty-one years at the farm of "one-fourteenth share of clear profits;" and that lease is recognized as subsisting in 1815, because in certain conditions of sale of the property advertised in

that year, it was spoken of as a lease to which the property was subject.

That lease being therefore established as having been made by the owner of the inheritance at the time that he was in possession, what appears to me to result from that fact is this. It appears to me that, just as any quarry opened by the owner of the inheritance himself, even although opened after the date of the mortgage,—provided it had been opened while he still was in possession, and while he still was acting as the owner of the property,—just as any quarry opened by him, would enure to the benefit of the mortgagee after he took possession and foreclosed, and would entitle him to call that an opened quarry, and to go on and work it as a source of profit arising from the property, so also any quarry opened by the lessees under this lease of 1811 would give the same rights to the mortgagee. And, my Lords, this also would flow from the lease of 1811; it not only would result from it that any quarry opened under that lease upon any part of the property would be lawful, *but it would also stamp that quarry when opened [461 with a commercial character, because the lease in its nature, and in its terms, is a lease for the express purpose of making money by quarrying as a commercial operation, and the product, the remuneration, upon which the landlord relies, is not a fixed sum by way of rent, but is, as it were, a sum arising from a partnership with those who were to be the tenants. He is to have a share of the profits of the quarry. Therefore, you have it in the clearest way that, provided it be established that any quarry was opened under the powers of that lease, that was a quarry the opening of which was rendered lawful by the owner of the inheritance, and was stamped by him as an opening for the purpose of commerce on the property.

Then, my Lords, that being so, the only question is, whether these openings to which I have referred, whether those quarries, which I have shown were commenced and carried on to a certain point at all events, were quarries the opening of which is to be referred to this lease of 1811 or not. Now, my Lords, there it is that it appears to me to be extremely important to consider upon whom the *onus* in the case lies, and I am far from laying down or wishing to suggest to your Lordships any general rule with regard to the question of the person upon whom in a case of this kind the *onus* must lie. If the case is recent, if there be no lapse of time or other circumstance to be brought into consideration, if you have simply a case of a term of years granted, and

the landlord comes forward and says, "I complain that my termor is working a quarry upon his land," in that state of things it may well be that it is for the tenant to answer, and to show that quarry was opened at the time when he entered into possession. But it may be very different when a long lapse of time has occurred, and especially it may be different, and it appears to me it must be different, where your Lordships have the singular fact which I have already referred to as existing in the present case, namely, that from 1820 to 1860, at all events, for a period of forty years, there was the owner of the inheritance, of full age, competent to act, and to bind himself, and living more or less in the neighborhood of the land in question, and that during 462] the whole of that time, that owner of *the inheritance made no complaint whatsoever as regards the opening of these quarries, or the existence of these quarries, or that which was done with these quarries, at the dates to which I have referred.

Now, my Lords, that being so, and it being the case that your Lordships are called upon after this lapse of time to examine into acts which were done between the year 1811 and the year, we will say, 1825, and having it proved in evidence that those acts were done, and having before you a document which would render those acts lawful, and would make it a right and proper thing that those acts should have been done, and being called upon to say what was the power or the authority under which the acts were done, it appears to me that the presumption will be and ought to be, by any court, that they were done under that authority which would render them lawful, unless those who are in the position of the appellants in the present case will come forward and can satisfy you by proper and apt evidence, that the acts were done, not under the authority which would render them lawful, but were done without authority and without any connection with the lease of 1811.

My Lords, there has been no attempt on the part of the appellants to dis sever the acts which were done, from the lease of 1811. It appears to me that the *onus* lay upon them to do so. It appears to me that if there was any ignorance on their part of the lease of 1811, when it became known to them, they ought to have been able to disconnect the acts from the lease, and might have had time accorded to them by the court for the purpose of producing evidence upon the subject. They have not produced any evidence of the kind, and in that state of things it appears to me that the legitimate and proper presumption for the court to make is,

that it was the lease of 1811 which led to and gave authority and legality to the acts done in the shape of quarrying under the property in question; and that that presumption is as strongly fortified as any presumption can be, by the farther circumstance that for forty years no complaint was made of these acts by the owner of the inheritance, who might have complained of them.

My Lords, under these circumstances, without going farther *into the details of the case, it appears to me [463 that the conclusion of the Court of Appeal was correct; and I submit to your Lordships that this appeal should be dismissed with costs.

LORD SELBORNE: My Lords, I am of the same opinion.

The facts of the present case, which admit of no controversy, are that when the respondents' predecessor in title entered into possession, foreclosed his mortgage, and became the absolute owner of the term of 500 years created in 1802, the whole of this property was subject to a lease granted by the reversioner while in possession, by which it was contemplated and intended that slate quarries should be worked in it,—without distinction of the upper from the lower part,—for commercial purposes; that the lower quarry was then confessedly open; and that the upper quarry, which alone is now in question, has been worked, to a greater or less extent, for or with a view to commercial purposes, from time to time since that date, as well during the continuance of the term granted by that lease, as afterwards; the earliest date of such working which is fixed at all distinctly by the evidence being in or about 1826, forty-seven years before the filing of the bill.

There are many circumstances, more or less material to a correct appreciation of these facts, of which neither of the parties to the present controversy has given—perhaps at this distance of time neither of them was able to give—any evidence. The existence of the lease of 1811 is proved by notes or other statements in the nature of admissions made by the solicitor who in 1815 represented the predecessor in title of the appellant; but the lease is not itself in evidence, and any light which might have been derived from a knowledge of its precise contents is wanting. It seems to me to be uncertain, upon the whole evidence, whether Griffith, the mortgagee, under whom the respondents claim, was a party to it or not. From what had taken place when an earlier lease of the lower quarry was contemplated (if not granted) in 1808, from the relations (so far as they appear) between Mr. Williams, who prepared that earlier lease as solicitor for both

the mortgagor and the mortgagee, and Mr. Pritchard, who prepared the lease of 1811—and from the fact that two of the 464] lessees of 1811 were also *two of the intended lessees of 1808—there is, I think, a strong probability that the mortgagee would have been made a consenting party to it. But, on the other hand, it seems clear that in 1815 this lease was not among the documents of title then in the possession of Mr. Williams, of which an abstract was furnished by him to Mr. Pritchard; and in Mr. Pritchard's notes of that date it is described as a lease from Robert Bulkeley Owen to Richard Owen, Hugh Hughes, and Richard Henry Davys, not mentioning Griffith. Whether Griffith was a party to it or not, any workings proved to have taken place under that lease would (I think) have been decisive of the present controversy; and, if he was a party to it, its mere existence when his title became absolute would have been enough, in my opinion, to make the quarry now in question then open as between him and the reversioner. The working of both quarries, in or about 1826, by a company locally connected with Carnarvon, under a quarry agent from Maennurog, is left unexplained, unless it ought to be referred to that lease. On all these points the questions of *onus probandi* and of the presumptions of fact (if any) which, under such circumstances and after such lapse of time, ought to be made, become highly important.

It is not, however, without aid from some other facts, besides those already mentioned, that these questions have to be determined. There is the evidence of several old witnesses who prove that there were, before the lease of 1811 was granted, two pits (or as they call them, "holes"), already opened within a short distance of the present works of the upper quarry, from which some slates had been obtained, and dressed or prepared for some kind of use. The size of these pits or holes is a point on which the recollection of those witnesses did not enable them to speak; and it was insisted by the appellants' counsel that they must have been of very small extent; and also (there being at that time no road to the upper quarry), that they must have been worked with a view, either to a mere search or trial of the ground, or to some repairs of buildings, or roofs of buildings, on the adjoining farm, and not for any purpose of commercial profit. The indistinctness of this evidence (considering the remoteness of the time, and the age of the witnesses) is not at all surprising; but it proves what is, in my opinion, sufficient when considered in connection with 465] the lease of *1811 and the other facts of the case, to

determine the question of *onus probandi*, as to all that afterwards took place, adversely to the appellants. It seems to be the most reasonable and probable conclusion that those pits or holes were opened with a view to such workings as those which were at the same time actually going on in the lower quarry, and which were authorized throughout the whole estate by the lease of 1811, although they may have been in some sense experimental, and though farther works, such as roads, were undoubtedly requisite to enable any slates quarried from them to be profitably brought to market. More than this does not appear to me to have been necessary to open, *de facto*, before the lease of 1811 was granted, a quarry, the working of which might lawfully be continued, not by the lessees only, but also by the respondents' predecessor in title, who, on the foreclosure, succeeded to all the rights of the lessor. I agree with the Court of Appeal in thinking that, under the circumstances of this case, all reasonable presumptions of fact, not inconsistent with what is proved on either side, ought to be made in favor of the lawfulness of what has so long been done.

Upon the questions of law which were argued at the bar, I think it unnecessary to make more than two remarks. The first is, that I am not at present prepared to hold that there can be no such thing as an open mine or quarry, which a tenant for life or other owner of an estate impeachable for waste may work, unless the produce of such mine or quarry has been previously carried to market and sold. No doubt, if a mine or quarry has been worked for commercial profit, that must ordinarily be decisive of the right to continue working; and, on the other hand, if minerals have been worked or used for some definite and restricted purpose (e.g., for the purpose of fuel or repair to some particular tenements), that would not, alone, give any such right. But, if there has been a working and use of minerals not limited to any special or restricted purpose, I find nothing in the older authorities to justify the introduction of sale, as a necessary criterion of the difference between a mine or quarry which is, and one which is not, to be considered open in a legal sense. Use, as well as sale, is a perception of profit. None of the *dicta* which are to be found in some of the more modern cases (each of which turned upon its own *particular circum- [466 stances), can have been intended to introduce a condition or qualification not previously known, into the law of mines.

The other observation which I desire to make is, that, when a mine or quarry is once open, so that the owner of an estate impeachable for waste may work it, I do not con-

sider that the sinking a new pit on the same vein, or breaking ground in a new place on the same rock, is necessarily the opening of a new mine or a new quarry; and for this, authority is to be found in the cases, which were cited at the bar, of *Clavering v. Clavering* (¹), *Bagot v. Bagot* (²), and *Lord Cowley v. Wellesley* (³).

LORD GORDON entirely concurred with the observations of his noble and learned friends, and agreed that the judgment of the court below must be affirmed.

Judgment appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 12th May, 1879.

Solicitor for appellant: *J. H. Lydall.*

Solicitors for respondent: *Best, Webb & Co.*

(¹) 2 P. Wms., 388. And see *Spencer v. Scurr*, 81 Beav., 334, and *Millett v. Davey*, 81 Beav., 470.

(²) 32 Beav., 509.

(³) 35 Beav., 635; Law Rep., 1 Eq., 656.

See 27 Eng. R., 474; 13 id., 690 note.

The word "not" was accidentally omitted in the statement of *Gaines v. Greene*. It should read as follows:

The life tenant has a right to use a mine for his own profit, where the owner of the fee in his lifetime opened it, even though he may have discontinued work upon it for a long period of years. A mere cessation of work for however long a period will not defeat the life tenant's right, but an abandonment for a day, with an executed intention to devote the land to some other use, will be fatal to the claim of the life estate. New shafts may be sunk upon veins of ore which had been opened: *Gaines v. Greene*, etc., 33 N. J. Eq., 603, reversing 33 id., 86.

See *East, etc., v. Wright*, 32 N. J. Eq., 248.

An instrument which purports, in consideration of a fixed annual rental, to lease and convey for a term of years all the coal on or under certain described land, is a mining lease, and authorizes the lessee to take out all the coal he can mine on the premises during the term. It is not an absolute grant of all the coal in the land.

Mere acceptance of a coal lease without entry made, or possession taken of either the land or the coal, vests in the lessee no property in the coal.

It is no defence to an action, for mining and taking coal, to a person

who had a mining lease upon the land, but had never entered nor done any work under the lease.

An action will lie for an injury to the possession of land, notwithstanding there is outstanding an unexpired lease granted by the plaintiff in the action, provided there is no one in possession under the lease. Under the same circumstances an action will lie for injury to the freehold caused by mining. Mere recovery of a judgment for rents due upon a mining lease of coal lands does not vest in the lessee the property in the coal, and this whether the judgment be satisfied or not.

In an action for wrongfully mining and taking coal, if it appears that the defendant's act was not wilful or grossly negligent, the true measure of damages for the coal taken is its value at the mouth of the shaft, less the cost of severing it from the freehold and delivering it at the mouth: *Austin v. Huntsville, etc.*, 73 Mo., 535.

A tenant for life may, when not precluded by restraining words, work open mines to exhaustion.

The term "mine" when applied to coal is equivalent to a worked vein, and if it be worked, a tenant for life may pursue it to the boundaries of the tract.

Where there are two different tracts separated by an intervening tract owned by another, with a vein extending beneath them, the opening on one tract

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does not extend to the other, and the tenant for life mining under the unopened one is guilty of waste: *Westmoreland Coal Co.'s Appeal*, 85 Penn. St. R., 344.

In the premises for a lease of 999 years, the grantor demised, set, and to farm let, the land described. The habendum clause was as follows: "To have and to hold the above granted and demised premises, with every privilege, right, member and appurtenances whatsoever to the same premises belonging, or in anywise appertaining, whether ways, waters, watercourses, mines and minerals, of whatever description," etc. Held, that although there was no open mine at the time of the demise, the lessee had the right to dig for minerals and to mine and take them away. When a lease permits the opening of mines, it is not a cause of forfeiture for the tenant to work them even to exhaustion. The term "minerals" embraces everything, not of the mere surface, which is used for agricultural purposes. Granite as well as fossils are comprehended within it: *Griffin v. Fellows*, 1 Leg. Chron. Rep., 210, affirmed 81 Penn. St. Rep., 114.

A lease for lives contained the following exception: "Excepting and re-

serving unto the said (lessor) all mines, minerals and other royalties whatsoever, with liberty to search for, dig, raise, manufacture on the premises, and carry away the same." Held, not to include open limestone quarries which the lessees had been in the habit of working: *Brown v. Chadwick*, 7 Irish Com. L., 101.

A tenant for life of an undivided portion of real estate has a right to his share of the profits accruing from the products of a quarry opened upon the premises.

A tenant in common may maintain assumpsit, independently of R. S., ch. 95, § 16, against a co-tenant who has received from sub-tenants more than his share of the rents and profits of the common estate; unless the plaintiff had been disseised by such co-tenant when the rents and profits were received. By that statute, this right of recovery in assumpsit is extended to cases of personal occupancy, by the co-tenant, of the whole, or more than his proportion of the common estate.

A disseisee of lands cannot maintain assumpsit for rents against the disseisor: *Richardson v. Richardson*, 72 Me., 403.

[4 Appeal Cases, 504.]

H.L.(E.), May 26, 27; June 17, 20, 23; July 28, 1879.

[HOUSE OF LORDS.]

*HENRY J. B. KENDALL and Others, *Appellants*; [504
and PETER HAMILTON, *Respondent* (').

Partnership—Joint and Separate Liability on one Contract—Res judicata—Law—Equity—Judicature Act.

There is no settled rule of equity that a contract which is in terms joint, and would be so construed at law, is to be treated in equity as joint and several.

An action, and a judgment against two persons who had borrowed money from the plaintiffs (though the judgment is unsatisfied), constitute a bar to another action brought by the same plaintiffs against a third person, who is afterwards discovered to have been really interested, as a partner, with the two debtors in the business for the purposes of which the money had been borrowed. (*King v. Hoare* (*) adopted. *Disa.* Lord Penzance.)

This result did not depend on the doctrine of election.

(') Affirming 30 Eng. R., 250.

(*) 13 M. & W., 494.

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Semble, per THE LORD CHANCELLOR (Earl Cairns): If the case was considered as one of agent and undisclosed principal there could be no doubt about it.

K. had, under a written arrangement between himself and W. & M., made large advances to them in respect of certain speculations in iron. W. & M. fell into difficulties. K. brought an action against them to recover the debt, and obtained judgment. This judgment remained unsatisfied. W. & M., who resided in Scotland, became bankrupt there, and K. put in his claim under the Scotch sequestration, and recovered a small dividend. K. then discovered that H. had been associated as a partner in the speculations in iron, and brought an action against him as having been jointly liable with W. & M. in respect of the advances:

Held, that the action against H. was not maintainable, the contract having passed into a judgment. *Diss.* Lord Penzance, on the ground that the objection to K.'s title to recover was merely one of technical procedure at law, and that since the Judicature Act, 1873, the rule of equity had, as to such a matter, superseded the rule of law, and the rule in equity admitted of this proceeding against H. the newly discovered partner.

The expression that partnership debts were treated in equity as joint and several explained.

THE appellants were merchants in London, and were the plaintiffs in an action against Hamilton, the respondent, under the following circumstances.

Messrs. Wilson & McLay were merchants in Glasgow, 505] and had, *among other matters, engaged in certain speculations in shipping old iron to the United States. They entered into arrangements with Kendall & Co. in relation to this particular part of their business. By these arrangements Kendall & Co. agreed to accept all such bills as should be drawn on them by Wilson & Co. against shipments of iron; the shipping documents were to be handed to Kendall & Co., and the bills to be delivered to Wilson & Co. in order that they might negotiate these bills for their own use. Wilson & Co. undertook to provide for the bills when due, and to keep Kendall & Co. out of cash advances, paying them one-half per cent. commission on the acceptances. This arrangement came into operation in 1871, and bills to a large amount were from time to time accepted under it. Messrs. Wilson & McLay got into difficulties. Four actions were brought against them by Kendall & Co. in respect of acceptances which Kendall & Co. had been obliged to meet. Two of these actions (the second and third) covered the whole debt which was the subject of the present action. The second was commenced on the 12th of June, 1874, and, by arrangement, judgment in it was signed in September, 1874. The third action was commenced in July, 1874, and judgment, for want of a plea, was signed in August, 1874. At that time, as it was alleged on behalf of the plaintiffs, Kendall & Co. were ignorant of the fact that Hamilton was in any way interested in the matters which were the subject of the dealings between themselves and

Wilson & Co. ('). No plea in abatement was put in. The amounts awarded by the judgments had never been received by Kendall & Co., the judgments remaining entirely unsatisfied.

On the 1st of April, 1875, a sequestration in bankruptcy according to the Scotch form issued against Wilson & Co., and on the 5th of April, 1875, Messrs. Grahames of Glasgow, appointed as trustees under this sequestration, wrote to Kendall & Co. as to proofs of their claims on the bankrupt estate, and the letter contained this sentence, "You will see that the claim has been made *out by us on the as- [506] sumption that it belongs entirely to the old firm, and that you have no farther security than the iron held. This latter we mention, as Wilson & Co. said something about having told you about a Mr. Hamilton being partly liable for their debt." In sending back the affidavits which this letter had required to sustain their claim against the estate of Wilson & Co., Messrs. Kendall wrote, "In regard to Mr. Hamilton, we never knew him in the transactions at all, and were only aware that he had an interest in the ventures of iron long after the whole of the debt was incurred."

Messrs. Kendall issued a writ against Mr. Hamilton from the Common Pleas on the 5th of July, 1877, and in their statement of claim alleged that Hamilton was, at all material times, a partner in the firm of Wilson & Co., and as such party to the transactions with that firm, and they claimed a sum of above £38,000 as due on the bills, and gave credit for a sum of £858 as a dividend recovered from the sequestered estate of Wilson & McLay.

Hamilton put in his statement of defence in August, 1877, denying that he was a partner; alleged that Kendall & Co. had always looked to Wilson & Co. and never to him; and that Kendall & Co. had proved against the estate of the bankrupts, and had in their affidavits on such occasion deposed that Wilson & Co. were solely liable in respect of the matters set forth in such affidavits.

There were originally two questions of fact raised for the consideration of the court, first, whether Hamilton had been a partner in the iron transactions of Wilson & Co., and, next, whether Kendall & Co., after knowledge of the connection between these parties, had not concluded themselves

(') In the court below Lord Justice Cotton, in delivering the judgment of the Court of Appeal, said, "In April, 1874, after the claim which is the subject of this action had arisen, there was a meeting between the plaintiffs and the part-

ners in the firm of Wilson, McLay & Co., at which the defendant was present, and in our opinion the fair result of the evidence is that the plaintiffs then learned that the defendant had an interest in the contract sued on."

by electing to proceed against Wilson & Co. alone. As to the first, the arrangements between the parties were contained in two letters, the first of which was dated the 20th of January, 1871, and was addressed by Wilson & Co. to Hamilton. It contained these words: "Referring to our different conversations in this matter, the arrangement come to between us is this: that all purchases of old rails, cast or malleable, scrap iron, wheels, tyres, axles, and other old material in India, shall be on the joint account of you and us, and that the profit or loss shall be shared equally between us. The financial arrangements shall be managed 507] entirely by us. . . . That a *statement of each transaction shall be made up, including all commissions, discounts, and other charges, and the net result shown, which, as before stated, shall be equally divided." The proportions of this division were altered in a letter of the 16th of November, 1864, in consequence of Mr. McLay himself going to India, but no other alteration took place. As to the second matter, the knowledge by Kendall & Co. of the relations between the parties, Hamilton alleged that on or about the 7th of April, 1874, after all the causes of action in the statement of claim had arisen, an interview of the parties took place at which Kendall and one of his partners (Mr. Pryor), Hamilton, Wilson, and McLay were all present, and Kendall and Pryor then had full notice that Hamilton was interested with Wilson, McLay & Co. in the shipments of iron. This statement of "full notice" was rather one of inference than fact, and was denied by Kendall & Co. The date of this interview preceded that of the actions by Kendall & Co. against Wilson & Co., and also preceded the date of the Scotch sequestration under which Kendall & Co. had proved their claim and had received a dividend.

The case came on for trial before Mr. Baron Huddleston (without a jury), and his Lordship, on a full consideration of the case, gave judgment in favor of the plaintiffs. On appeal Lord Justice Cotton delivered the judgments of Lords Justices Brett, Thesiger, and himself, reversing the judgment of the court below ('). This appeal was then brought.

The case was twice argued. First, before Lord Hatherley, Lord Penzance, Lord Blackburn, and Lord Gordon. Secondly, before the Lord Chancellor (Earl Cairns), Lord Hatherley, Lord Penzance, Lord O'Hagan, Lord Selborne, Lord Blackburn, and Lord Gordon.

(') 3 C. P. D., 408; 30 Eng. R., 250.

Mr. *Kay*, Q.C., and Mr. *Watkin Williams*, Q.C., and Mr. *C. S. Bowen*, were for the appellants.

Mr. *Benjamin*, Q.C., and Mr. *Rigby*, appeared for the respondent.

For the appellants it was contended that this action against Hamilton was properly maintainable. He had a partnership *interest in the particular transactions [508 on which arose the claim of the appellants. The letter of the 20th of January, 1871, explained the nature of the partnership, and the other letters showed it to have been adopted and acted on. He was, therefore, liable in respect of that interest. Even at law he would, in point of principle, be liable, and the only difficulty that could arise there, would be one occasioned by the mere form of proceeding at law, which supposed that the same contract could not be the subject of two different suits, especially after the original cause of action had been declared and adopted as the ground of a judgment, and judgment on it had been entered up. It was supposed that the contract had then ceased to exist as a contract, and had become *res judicata*. But now, the courts of law had an equitable as well as a legal jurisdiction, and under the Judicature Act, 1873 (¹), the technical objection against a proceeding like the present no longer existed, but the rules of equity would in a case like this prevail. *Lane v. Williams* (²) showed that where one partner signed a note as for both, the money might be recovered in equity against the estate of the other partner. A similar result was come to in *Bishop v. Church* (³). And in *Gray v. Chiswell* (⁴) Lord Eldon treated it as settled that equity would consider a partnership debt of the kind as several as well as joint; and with regard to the proof in bankruptcy, which does not allow joint creditors to come on the separate estate till the separate creditors have been satisfied, he observed, "It is extremely difficult to say upon what the rule in bankruptcy is founded." There is here no question of conflict between joint and separate estates, so that that difficulty does not arise. In *Jacomb v. Harwood* (⁵) it was held that judgment in an action against a surviving partner was no extinguishment, in equity, of the partnership debt. But even at law, in *Rice v. Shute* (⁶), Lord Mansfield, taking a

(¹) 36 & 37 Vict. c. 66, s. 24; and same matter, the rules of equity shall prevail."

a. 25, subs. 11: "Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law, with reference to the

(²) 2 Vern., 277-292.

(³) 2 Ves. Sen., 100, 371.

(⁴) 9 Ves., 118.

(⁵) 2 Ves. Sen., 265.

(⁶) 5 Burr., 2611.

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509] distinction between torts and contracts, said, *that the principle of law was that "all contracts with partners are joint and several. Every partner is liable to pay the whole." In *Daniel v. Cross* (1) the estate of a deceased partner in a bank was held liable upon notes issued before his death, which appeared to have been called in, but had been reissued by his surviving partners. In *Ex parte Kendall* (2) Lord Eldon, after referring to *Hoare v. Contencin* (3) and to the rule of equity, though he expressed his "surprise that a court of equity should have interposed to enlarge the effect of a legal contract" (4) did not suggest a doubt of the existence of the equitable rule. In *Devaynes v. Noble* (5) Sir W. Grant speaks of this equitable rule as very distinctly established. *Sumner v. Powell* (6) does not detract from that, for it merely declares that every joint covenant is not to be considered joint and several when the obligation exists only by virtue of the covenant, as in that case itself, where there was no previous debt, and nothing relating to actual third parties, the indenture being a mere arrangement between the parties to it, the extent of the obligation could consequently only be measured by the words of the covenant itself. That the ordinary liability of a partner in a trading firm is in equity several as well as joint, was shown in *The Liverpool Bank v. Walker* (7), where two executors carried on their testator's business, and in that character, as executors, accepted a bill, and it was held that the ordinary equitable liability on the bill attached on the estate of one of those who died in the lifetime of the other. In *Wilkinson v. Henderson* (8) the whole question was elaborately argued, and the Master of the Rolls began his judgment by declaring (9) that "all the authorities establish that in the consideration of a court of equity a partnership debt is several as well as joint;" and in *Beresford v. Browning* (10) the present Master of the Rolls, observing upon Sir W. Grant's remarks in *Devaynes v. Noble*, *Sleech's Case*, as to what might have been the origin of the rule, says (11) that wheresoever the doctrine came from, "the law has never

510] been *questioned that it extends to all mercantile partnerships." The doctrine that no arrangement between the partners could affect their joint and several liability to creditors was distinctly affirmed when *Beresford v. Brown-*

(1) 3 Ves. Jun., 277.

(2) 17 Ves., 514.

(3) 1 Bro. C. C., 27.

(4) 11 Ves., at p. 525.

(5) *Sleech's Case*, 1 Mer., 563.

(6) 2 Mer., 30; T. & R., 423.

(7) 4 De G. & J., 24.

(8) 1 My. & K., 582.

(9) 1 My. & K., 588.

(10) Law Rep., 20 Eq., 564; 15 Eng. R., 637.

(11) Law Rep., 20 Eq., at p. 378.

ing went to the Court of Appeal (*). The form of the decree in such a case is given in Seton on Decrees (*). In *Lodge v. Prichard* (*) the testator had been a partner in a trading firm. Shortly after his death the surviving partner became bankrupt, a dividend was paid upon the joint debts, and the joint estate was fully administered, but after that a decree was made for the administration of the testator's estate, the joint creditors being only prevented from proving for the residue of their claims until after the testator's separate creditors had been paid. The right was admitted, though the rights of other persons were treated as having a preference. In the case of *Robinson's Executors* (*) the holders of shares in a joint stock company were held individually responsible to the creditors of the company. The rule which was acted on in all these cases had been distinctly laid down in *Thomas v. Frazer* (*) and *Burn v. Burn* (*) as to bonds given by partners, on the face of which the liability, as expressed in words, appeared to be joint only, but in which the liability was held to be also several.

There was no such thing as election here. The plea in abatement being abolished, the Legislature had intended by the application of the rules of equity to such a case to secure to plaintiffs the advantages which they would otherwise have obtained from that plea. In *Ex parte Higgins* (*) the judgment proceeded expressly on the ground that there had been election in that case. Here there was none. The plaintiffs had done all that they could to recover the debt. They had no information when they sued Wilson & McLay that the defendant was really a partner with them in this particular business, and no doctrine of election could be applied to a person who was not fully acquainted with the facts. *King v. Hoare* (*) was not properly applicable here, for there could be no doubt that the credit there was given to the two *parties together, it was so alleged in the plea, and [51] not only not denied—but, as the case was heard upon a demurrer to the plea, it was in fact admitted. That case was, in truth, one of wilful election with a full knowledge of the facts, and could not, therefore, be made to apply to a case like the present, where the arrangement between the three parties was entirely secret, and where until quite recently, and after the first action had been determined, no one was acquainted with its real nature. It was also to be observed

(*) 1 Ch. D., 30; 15 Eng. R., 637.

(*) Pages 237, 239.

(*) 1 De G. J. & S., 610.

(*) 6 D. M. & G., 572.

(*) 3 Ves., 399.

(*) 3 Ves., 573.

(*) 3 De G. & J., 38; 27 L. J. (Bankcy.), 27.

(*) 13 M. & W., 494.

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that in *Ex parte Waterfall* (1) Vice-Chancellor Knight-Bruce suggested a doubt as to the authority of the decision in *King v. Hoare* (2). But without disputing its authority, it was clearly distinguishable from the present case.

For the respondent it was contended that there was no such universal rule of equity as would make the respondent here liable. In equity itself there was no rule that a joint contract was also to be treated as a several contract, though in the case of the death of one of the joint contractors, equity allowed a remedy against the assets of the deceased. The rule of law was, however, positive, and must apply to this case, and, that being so, the action could not be maintained against Mr. Hamilton. The contract had been made with Wilson & McLay alone, and they alone were trusted by the appellants. The Judicature Act did not affect the established rule of Law and give a new right of action where none had before existed, but only gave an opportunity to assert an existing and acknowledged right where the forms of law might not be sufficient for that purpose. Here the forms of law had been amply sufficient to secure to the appellants a legal judgment against their real debtors, and there was no conflict of law and equity, nor, indeed, such difference between them as could give a pretence for calling in aid the provisions of the Judicature Act to complete a defective proceeding at law. The original contract liabilities had by the judgment been ascertained and declared—and, according to the rule clearly declared in *Brown v. Wootton* (3), and expressly adopted in *King v. 512*] *Hoare* (2), the cause of action being *converted into *rem judicatam* could not be made the subject of a new action.

The principle on which this case must be decided was fully stated in *King v. Hoare* (2) and that case had never been impeached. There the action was brought against one of the parties known to be jointly interested, and judgment recovered, and though there had been no satisfaction of the judgment, the fact that judgment had been obtained, and a mere cause of action had been so converted into *rem judicatam* against one party, was held a bar to an action against the other party.

Mr. Kay replied, and contended that the decision in *King v. Hoare* did not lay down a principle which affected this case, but depended entirely on the forms of pleading and on

(1) 4 De G. & Sm., 199; S. C. *nom. Ex parte Jones*, 20 L. J. (Bankcy.), 5.

(2) Cro. Jac., 73; Yelv., 67; Moor., 762.

(3) 13 M. & W., 494.

the particular circumstances which existed there. Besides which, equity always treated partnership debts as several as well as joint, and the rule of equity must now, by force of the special provision in the Judicature Act, govern the decision of this case, so that even, if in itself an authority, *King v. Hoare* had ceased to be applicable.

THE LORD CHANCELLOR (Earl Cairns): My Lords, in the arguments in this case at your Lordships' bar, as well as in the arguments and judgments in the court below, the facts of the case were presented in a form which may be thus described: It was said that the appellants were creditors to whom a debt was due from Wilson, McLay, and the respondent Hamilton; that this was in the nature of a partnership debt due from the three jointly; that the appellants brought an action for the debt against Wilson & McLay alone; that at the time they brought the action they were not aware that the debt was contracted by Hamilton jointly with Wilson & McLay; that Wilson & McLay did not plead in abatement, or otherwise object to the non-joinder of Hamilton; that judgment was obtained by the appellants against Wilson & McLay, but this judgment, by reason of the insolvency of Wilson & McLay, did not lead to satisfaction of the debt; that the appellants afterwards discovering the interest of Hamilton, brought an action against him for the debt, which is the action out [513] of which the present appeal arises; that thereupon two questions arose for the determination of the court—first, was the judgment recovered against Wilson & McLay, even without satisfaction, a bar, according to the principle hitherto prevailing in courts of common law, to the action against Hamilton? and, secondly, was there not a doctrine in courts of equity that all partnership debts were several as well as joint, and, if so, ought not that doctrine to be applied just as if the debt in this case had been the several debt of Hamilton, so as to prevent him setting up the judgment against Wilson & McLay as an impediment to the appellants suing him, Hamilton?

I will presently endeavor to express to your Lordships what my opinion would be upon these questions if they were really the questions to be determined in the case. But I must first suggest to your Lordships that the facts of the case, when properly considered, would seem to me to make it doubtful whether the questions which I have mentioned really arise in the case, and whether the case does not fall to be determined upon consideration somewhat different.

Between 1870 and 1874 the appellants were merchants

carrying on business in London. Wilson & McLay were carrying on business in Glasgow and London under the firm of Wilson, McLay & Co. Wilson & McLay undertook certain speculative shipments of old iron, and the appellants agreed to provide, through the acceptance and discounting of bills of exchange, the money necessary to carry on these speculations. In point of fact, although the appellants did not know it at the time, the respondent Hamilton was interested in these shipments. Hamilton had agreed that the shipments should be for the joint benefit of himself, Wilson & McLay, and the financial arrangements should be managed by Wilson & McLay. Wilson & McLay were, therefore, in reality the agents authorized to borrow money for undisclosed principals, who were Wilson, McLay, and Hamilton. The persons advancing the money would have the right, on becoming aware of the interest of Hamilton, to sue Wilson, McLay, and Hamilton, as the principals on the contract, and if they sued Hamilton alone he would have a right to plead in abatement the non-joinder of Wilson & McLay. 514] But the persons advancing *the money would also have the right to treat Wilson & McLay as the principals, and to sue them alone; and Wilson & McLay would have no right in such an action to plead in abatement, or otherwise object to the non-joinder of Hamilton.

In the present case, the transactions to which I have referred resulted in a large sum of money being due to the appellants. For this sum they brought an action against Wilson & McLay. This they were clearly entitled to do, whether they knew or did not know of the interest of Hamilton. They might, it is true, at any time before judgment, have discontinued the action against Wilson & McLay, and have brought a fresh action against Wilson, McLay, and Hamilton, as principals, but, if they did not do so, Wilson & McLay could not in any way have objected to the non-joinder of Hamilton, or have contended that they were not the persons, and the only persons, to be sued. In this state of things the action went on, and resulted, as I have already said, in a judgment against Wilson & McLay.

Now, I take it to be clear that, where an agent contracts in his own name for an undisclosed principal, the person with whom he contracts may sue the agent, or he may sue the principal, but if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even although the judgment does not result in satisfaction of the debt. If any authority for this proposition is needed, the case of

Priestley v. Fernie ⁽¹⁾ may be mentioned. But the reasons why this must be the case are, I think, obvious. It would be clearly contrary to every principle of justice that the creditor who has seen and known and dealt with and given credit to the agent, should be driven to sue the principal if he does not wish to sue him, and, on the other hand, it would be equally contrary to justice that the creditor on discovering the principal, who really has had the benefit of the loan, should be prevented suing him if he wishes to do so. But it would be no less contrary to justice that the creditor should be able to sue first the agent and then the principal, when there was no contract, and when it was never the intention of any of the parties that he should do so. Again, if an action were brought and judgment recovered against the agent, he, the agent, would have a right of action for *indemnity against his principal, while, if the principal [515] were liable also to be sued, he would be vexed with a double action. Farther than this, if actions could be brought and judgments recovered, first against the agent and afterwards against the principal, you would have two judgments in existence for the same debt or cause of action; they might not necessarily be for the same amounts, and there might be recoveries had, or liens and charges created, by means of both, and there would be no mode, upon the face of the judgments, or by any means short of a fresh proceeding, of showing that the two judgments were really of the same debt or cause of action; and that satisfaction of one was, or would be, satisfaction of both. In the present case I think that when the appellants sued Wilson & McLay, and obtained judgment against them, they adopted a course which was clearly within their power, and to which Wilson & McLay could have made no opposition, and that, having taken this course, they exhausted their right of action, not necessarily by reason of any election between two courses open to them, which would imply that, in order to an election, the fact of both courses being open was known, but because the right of action which they pursued could not, after judgment obtained, coexist with a right of action on the same facts against another person. If Wilson & McLay had been the agents, and Hamilton alone the undisclosed principal, the case could hardly have admitted of a doubt; and I think that it makes no difference that Wilson & McLay were the agents and the undisclosed principals were Wilson, McLay, and Hamilton.

My Lords, if the view which I have taken of the facts

⁽¹⁾ 3 H. & C., 977.

and of the law applicable to them is correct it is not necessary to look at Wilson, McLay, and Hamilton in the position of co-contractors; but, looking at them in this light, I must say that the case of *King v. Hoare* (') appears to me to have been decided on satisfactory grounds. It is the right of persons jointly liable to pay a debt to insist on being sued together. If then there are three persons so liable, and the creditor sues two of them, and those two make no objection, the creditor may recover judgment against those two. But should he afterwards bring a farther action against the third, 516] that third may justly contend that the three *should be sued together. It is no answer to him to say that the other two were first sued and made no objection, for the objection is the objection of the third, and not of the other two. Nor is it any answer to him to say that whatever he pays on the judgment against himself he may have allowed in account with the others, because he may fairly require, with a view to his right of account or contribution, to have the identity and the amount of the debt constituted and declared in one and the same judgment with his co-contractors. If, therefore, when the third is sued, and requires that the other two should be joined as parties, the creditor has to admit that he cannot join the other two because he has already recovered a judgment against them in the same cause of action, this is equivalent to saying that he has disabled himself from suing the third in the way in which the third has a right to be sued.

It has been suggested that even assuming the case of *King v. Hoare* (') to have been rightly decided, the law as laid down in that case has been altered by the Judicature Acts and by the abolition of the plea in abatement. I am unable to agree to this suggestion. I cannot think that the Judicature Acts have changed what was formerly a joint right of action into a right of bringing several and separate actions. And although the form of objecting, by means of a plea in abatement, to the non-joinder of a defendant who ought to be included in the action, is abolished, yet I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused, on the same principles on which a plea in abatement would have succeeded or failed. In this particular case, indeed, I observe the judgment against Wilson & McLay was obtained before the Judicature Act came into operation: and if this judgment then became pleadable in bar (according to *King v. Hoare* (')) by Hamilton in answer to an action against himself, I can-

(') 13 M. & W., 494.

not see how this defence is taken away from him by the Judicature Act subsequently coming into operation.

If, then, this was the attitude of defence which Hamilton was entitled to take up in opposition to the present action, it does not appear to me that any difference is made by the doctrines of the Court of Equity with regard to partnership debts. There is no *doubt that in many cases and [517] text-books we find the expression that a partnership debt is in equity joint and several. This, however, is only a compendious expression, which must be interpreted with reference to what were the functions of the Court of Equity as to partnership debts. The only interposition of a court of equity with regard to partnership debts, took place in the administration of the assets, either of the partnership or of a deceased member of the partnership. Where a member of the partnership died, the debts became in the eye of a court of law the debts of the survivors; but the survivors, on the other hand, in a court of equity, had the right, as against the estate of a deceased partner, to say that his representatives should not withdraw any part of the partnership property until all the debts were paid or provided for. If, therefore, a court of equity was administering the assets of a deceased partner, it would, in order to clear his estate, ascertain his liabilities to the partnership, and for this purpose would ascertain the debts due from the copartnership at his death. From this the transition was easy to giving the creditors of the partnership a direct right, and not merely an indirect right, through the surviving partners, to come for payment against the assets of the deceased partner; and from this again the transition was easy to the expression which said that partnership debts, in the eye of a court of equity, were joint and several—not thereby meaning that a court of equity altered or changed a legal contract, but merely that the court, in order, before distributing assets, to administer all the equities existing with regard to them, would go behind the legal doctrine that a partnership debt survived as a claim against the surviving partners only, and would give the creditor the benefit of the equity which the surviving partners might have insisted on.

My Lords, this is so clearly expressed by Lord Eldon in the case of *Ex parte Williams* (*), that I will take leave to read his expressions, which appear to me to render unnecessary any comment on the numerous authorities which were cited on this head at your Lordships' bar. Lord Eldon says (*), "Among partners clear equities subsist, amount-

(*) 11 Ves., 3.

(*) 11 Ves., at p. 5.

ing to something like lien. The property is joint ; the debts and credits are jointly due. They have equities to discharge each of them from liability, and then to divide 518] *the surplus according to their proportions. . . But, while they remain solvent, and the partnership is going on, the creditor has no equity against the effects of the partnership. He may bring an action against the partners and get judgment, and may execute his judgment against the effects of the partnership. But, when he has got them into his hands, he has then by force of the execution, as the fruit of the judgment, clearly not in respect of any interest he had in the partnership effects, while he was a mere creditor, not seeking to substantiate or create an interest by suit. There are various ways of dissolving a partnership—effluxion of time, the death of one partner, the bankruptcy of one, which operates like death, or, as in this instance, a dry, naked agreement that the partnership shall be dissolved. In no one of those cases can it be said that to all intents and purposes the partnership is dissolved, for the connection still remains until the affairs are wound up. The representative of a deceased partner, or the assignees of a bankrupt partner, are not strictly partners with the survivor or the solvent partner, but still, in either of those cases, that community of interest remains, that is necessary, until the affairs are wound up ; and that requires, that what was partnership property before shall continue for the purpose of a distribution, not as the rights of the creditors, but as the rights of the partners themselves require ; and it is through the operation of administering the equities, as between the partners themselves, that the creditors have that opportunity ; as in the case of death it is the equity of the deceased partner, that enables the creditors to bring forward the distribution.” I imagine that the words “bring forward” are probably an inaccurate report ; but it obviously means to insist upon the distribution.

If, therefore, this case is to be looked at as a case in which judgment has been recovered for a partnership debt against two out of three copartners, it appears to me that, on the principle of *King v. Hoare* (¹), the judgment would be a bar at law to a subsequent action against the third copartner ; and I know of no principle on which a court of equity could hold the debt to be several for the purpose of preventing such a result.

In any view of the case, therefore, I am of opinion that 519] the *judgment of the court of appeal was correct, and

(¹) 13 M. & W., 494.

I have to move your Lordships to dismiss the appeal with costs.

LORD HATHERLEY: My Lords, I am of the same opinion as to the result which must be arrived at in this case. The question here is, whether or not a person who was unknown to the plaintiffs at the time they were advancing their money, as being one of the borrowers of the money, and who was acting through the agency of Messrs. Wilson & McLay, is now, in consequence of anything which has taken place under the Judicature Act (for that was the principle of the argument at the bar) placed in a different position from that in which he would have been if that act had not been passed. If it had not been passed, I think his position would have been sufficiently clear.

Now if *King v. Hoare* (¹) is to subsist as an authority—and having stood so long I apprehend it would be difficult to shake it as an authority now—then the plaintiffs in this case having sued two of the partners and having omitted to sue the other partner, of whose existence they were unconscious (as I think the whole of the evidence goes to show), having proceeded against two partners and obtained a judgment against them, their co-contractor could not, according to *King v. Hoare* (¹), be sued, because the debt, which was a simple contract debt in the first instance, contracted by the firm, had passed into *rem judicatam* under the operation of the judgment which had been obtained against the two.

My Lords, I would therefore, for the purpose of considering this case, which has been discussed by my noble and learned friend the Lord Chancellor upon the general question of agency, prefer to consider it as a simple question of partnership, in which a debt has been contracted; and I assume for the present purpose that it was originally joint, in order that we may see what remedies were at the time open to the plaintiffs, independently of death. This case not being like the numerous cases cited, in which the Court of Chancery held a partnership deed to be joint as well as several (there being no death in this case), it is obvious *that such remedy as the plaintiffs then had was en- [520
tirely at law. The Court of Chancery could offer no assistance in the case where there was a legal contract, unless there was found in that contract some element which made it inequitable that the debtor should be allowed to set up the defence now relied on. In the case of a person setting up a term of years at law the Court of Chancery can interfere by injunction, and prevent his doing so, but that case

(¹) 13 M. & W., 494.

would be very different. If the defence in *King v. Hoare* (') be, as has been supposed by some, and as was urged and alleged at your Lordships' bar, contrary to what one may call the equitable engagement between the parties, then I apprehend the proper course would have been to take some proceedings for preventing the defendant from setting up such a defence as was effectually set up in *King v. Hoare* ('), on the ground that it was an inequitable defence, and that a judgment obtained against two of the co-contractors in the absence of the third, should prove no bar to a subsequent suit against the third. But not only was no such attempt made in this case, but in no case that I ever heard of, in equity, has there been any injunction applied for, much less obtained, with regard to that particular position of the parties.

What happened in *King v. Hoare* (') was, that one of the parties died, and then an application was made that the equity which has been administered from time to time in chancery with regard to the assets of a deceased partner, and the distribution of those assets among the several creditors, might be made available on account of that death. But then that was met by the averment that the death had happened since the suit, and that it could not interfere with the previous suit, but that that must meet with the common fate of such suits.

That, my Lords, being the position of the parties at common law, what was their position in equity? Numerous cases were cited to your Lordships to show that the equity courts recognized a partnership debt as being, in its nature and essence, a joint and several debt. I have had an opportunity of seeing the opinion about to be delivered by one of your Lordships, which goes into more detail than I think it is necessary for me to go into at this moment; but I can 521] say with confidence, having gone through the *cases cited before you, that no case will be found in which any such assertion has been made with reference to the nature of the debt except *sub modo*—that is to say, except in those cases where the remedy has been given against the assets of the deceased partner, upon the grounds which are stated very distinctly by Lord Eldon in the case of *Ex parte Williams* ('), cited to your Lordships by my noble and learned friend on the woolsack.

These cases are numerous, but although they are so numerous there is no single case existing in which an attempt was made to administer that particular species of equity which would induce the court to turn a contract at

(') 13 M. & W., 494.

(') 11 Ves., 3, at p. 5.

law joint, into a joint and several contract. In all these cases there has been a necessary administration of assets for the purpose of clearing the assets as between the partners themselves.

My Lords, that being so, there is, I apprehend, no mode in which the relief now asked in this action, and asked under the new procedure, could be obtained. A court combining law and equity under the Judicature Act is authorized to adopt the procedure of a court of equity, and the court of equity is compelled to avail itself of the powers given to it as a court of law. There is nothing in those circumstances which can, as it appears to me, assist the plaintiff at all, if he had not at the time of the passing of the act any remedy which could be given him by law, or any remedy which could be given him by equity. It does not seem to me possible that two powers combined, neither of which could effect anything of itself, would have a more efficacious result than when taken separately, except in this sense, that if there was really a remedy in the one court which was not given by the other, you can understand that the assistance of the one might give a more complete, perfect, and effectual remedy than the other separately. In this case before the passing of the Judicature Act, nothing could have been recovered at all, in respect of legal debt, in a court of equity, and a court of law having once given judgment on a contract, had no power to authorize any procedure against a third person as a party to that contract.

Now, my Lords, during the argument in the court below, the remark was quoted as having been made by a very eminent *judge, that this rule which was adopted in [522 *King v. Hoare* (')] was entirely a rule of procedure. I do not take that view of the case, because I apprehend that when Mr. Hamilton contracted together with others to pay the debt, in contracting jointly he gave rights to those others. Suppose the debt was enforced against one of those who were jointly liable for the debt, rights would be acquired by the one who paid the whole debt against those who had not taken part in that payment. One great object in bringing all the parties concerned before the court is this: in equity it is always considered essential that if there be a suit upon a debt for which two parties are jointly liable, you must have both those parties present in order to enforce the payment of that debt. The reason is, that the person who has entered into this joint contract has a right to have the whole matter settled at once. Otherwise you might

(¹) 13 M. & W., 494.

bring an action against the co-contractor, and having established your case against the co-contractor, having established it, we will say, for £1,000 as principal moneys and interest between the two, you might then proceed to bring a totally distinct action against the other, and obtain from him payment of a larger or a smaller sum as the case might be. But you would obtain a judgment which would settle nothing as between the two co-contractors; it would settle nothing as regarded the debt due, by way of suretyship, from one co-contractor against the other contractor. Each of the co-contractors has a right to be sued and to have the matter settled at once, instead of its being settled piecemeal. He ought not to be compelled to submit to another suit, which would indeed be equally disadvantageous to the plaintiff himself, because of course the defendant in that suit would naturally have a right to insist upon having the debt proved against him, if at all, to the extent to which it had been proved against his co-contractors.

When it is said here that the co-contractors do not mean the whole of the three partners to the suit, Mr. Hamilton has nothing to say to that whatever—he remains ignorant—there is nothing to show that he necessarily was aware of what was coming upon him with regard to the question in dispute. He would have no opportunity of defending that 523] other action when it was brought *against the co-contractors, and it would not lie with him to raise a plea in abatement, if it ever could be raised. Those who ought, if they intended to have set up that plea, to insist upon it in the first instance, were his co-contractors, and if the plaintiff himself, being unaware of the existence of this partner, did not introduce him in the first instance, he must take the consequence of losing the advantage which might have been obtained from having Mr. Hamilton as one of the co-contractors. That advantage could not be retained by the plaintiffs, and ought not in justice to be retained by them after they had attained the result they were aiming at, namely, the judgment against the two co-contractors.

It has been observed during the course of the argument here, that, in truth, as to the abstract justice of this case, there is a pretty even balance between the two, because it is only by the fortunate accident of Mr. Hamilton being a solvent party that the plaintiff finds that he has a solvent co-contractor, of whom he was unaware. He did not contract with Mr. Hamilton except as an undisclosed person, and this undisclosed person with whom he entered into no engagement that he knew of, turns out afterwards to be lib-

erated in consequence of the plaintiff not having taken steps to ascertain who were the co-contracting parties when he was bringing the action. The plaintiff having advanced the money, looked to Wilson & McLay as the people who should pay, but he has since discovered that there is another person whom he thinks he may sue. I think it would not be conducive to the advancement of abstract justice that he should have an opportunity of suing this person whom he did not sue when he sued the two co-contractors. My Lords, I see nothing I confess in the case of *King v. Hoare* (') which would lead one to doubt that this case was one, as the law stood, legally decided; and if there be any consequential injustice arising from any particular circumstances to persons similarly situated to Messrs. King & Hoare, the evil would preponderate over any advantage there might be in requiring all co-contractors to be made parties liable. If there is any injustice in it, it can only be remedied by the Legislature, should it think fit to afford this remedy. At this distance of time, after so much reliance has been placed, from time to time in other cases, *upon the law as laid [524 down in *King v. Hoare* ('), it cannot be now altered by a decision of your Lordships' House, the ordinary practice of which would require that which has been so long established as the law amongst mercantile men to be continued until it has been reversed by act of Parliament.

My Lords, I am therefore of opinion that the resolution you are asked to come to sustaining the decision of the court below and dismissing the appeal is a correct conclusion, and that no substantial injustice will be done in that way.

LORD PENZANCE: My Lords, the plaintiff in this action has advanced a large sum of money to the defendant in conjunction with two other persons. The defendant has had the full advantage and benefit of the plaintiff's money to the extent of his share in the joint adventure. In every aspect of the case, therefore, the plaintiff has no doubt acquired a legal, equitable, and moral right against the defendant to repayment; nor has this been, even in argument, denied. The defence set up against this just claim rests upon this, and upon this alone, that in accordance with a certain rule of procedure established some five-and-twenty years ago by the single case of *King v. Hoare* ('), which has never yet had the sanction of a Court of Appeal, the plaintiff, by bringing a previous action against two out of the three partners, has wholly lost his remedy against the de-

(') 13 M. & W., 494.

fendant, who is the third. I will presently examine the technical grounds upon which this rule is based, but before doing so I cannot forbear asking myself how far such a rule is consistent with justice. What justice, then, is there in saying that when three persons are, all and each, individually liable to pay a debt, an action and judgment (still unsatisfied) against two of them should extinguish the liability of the third? The most that can be said is that by two actions being brought instead of one, additional costs have been incurred. The joint contractors or partners may reasonably insist that the plaintiff should not pursue his remedies against them in a vexatious manner, and if two actions are, without good reason, brought where one would have sufficed, it may well be that to the extent of the extra [525] costs thereby involved the loss should *be borne by the plaintiff. But this is a very different penalty from the extinction of the defendant's liability, which may be the same thing as the loss of the plaintiff's debt altogether. Even this consideration, however, as to unnecessary costs, applies only to a case in which the plaintiff, with his eyes open, has chosen to sue some of the partners first and the others afterwards. It cannot apply to a case like the present, in which the two first sued concealed the fact that the third was a partner in the adventure, a fact of which the plaintiff was himself ignorant, and, being ignorant, could not possibly have sued the whole three together. This circumstance removes at once all blame from the plaintiff, and with it all semblance of justice from the defence now made. So entirely is this the case that no argument has been ever offered at your Lordships' bar, to show that the defendant has been prejudiced by the plaintiff's conduct, or that anything has taken place which ought, in reason or justice, to render the defendant less liable to pay this debt now than he was at first. The defence is, and has been rested throughout, wholly and solely upon the technical rule to which I have adverted, and the authority of the case by which that rule was laid down.

In this state of things I confess I am unwilling that your Lordships should confer the high sanction of this, the ultimate Court of Appeal, upon a rule of procedure which, without affecting to assert any just rights on the part of the defendant, denies the aid of the law to enforce those of the plaintiff. Procedure is but the machinery of the law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to ob-

struct, and even extinguish, legal rights, and is thus made to govern where it ought to subserve.

With these observations I proceed to consider the case of *King v. Hoare*⁽¹⁾, upon which the present case is rested. The proposition that a cause of action which has never been before the court at all has become "*res judicata*" is a startling one. The present plaintiff has never before impleaded the present defendant—has never made any previous attempt to enforce the liability which he now asserts, and yet is met at the threshold of his suit with the plea that the [526 matter between him and the defendant has already become "*res judicata*."

The doctrine of law regarding merger is perfectly intelligible. Where a security of one kind or nature has been superseded by a security of a higher kind or nature, it is reasonable to insist that the party seeking redress should rest upon the latter, and not fall back on the former. In like manner, when that which was originally only a right of action has been advanced into a judgment of a court of record, the judgment is a bar to an action brought on the original cause of action. The reasons for this result are given by Baron Parke in *King v. Hoare*⁽²⁾. He says: "The judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of attaining the same result. Hence the legal maxim, '*Transit in rem judicatam*;' the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher."

This reason is satisfactory and conclusive upon the assumption that the cause of action attempted to be sued upon is the same cause of action with that upon which a judgment has already been obtained. But is it so in a case like the present? If a man deliver goods or lend money to two partners, the promise which the law implies is a joint promise. The effect of such a promise, as distinguished from a joint and several promise, is that in case of death the debt is enforceable only against the survivor. If the farther effect of such a joint promise in point of law were that it could not constitute a cause of action against one only of the two contractors, then the reasoning in the case of *King v. Hoare*⁽¹⁾ would be unquestionable, for there could be but one cause of action resulting from it, and that a joint one,

⁽¹⁾ 13 M. & W., 494.

⁽²⁾ 13 M. & W., 494, at p. 504.

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and the cause of action having been advanced to a judgment, could not support a second action. But this is not what the cases establish the effect of a joint promise to be. If a man contracting, as above supposed, with two partners, likes to bring an action against one only, and to allege against him a promise by him alone (taking no notice what-527] ever *of the other partner or of his promise), he has a *good cause of action*, and one which cannot be defeated by the defendant's proving that the promise was not made by him alone, but by him jointly with another. Now, if a joint promise by two were a thing so different in point of law in its quality and character, from a promise by one only, that it could not be held to include within it a promise by each; and if it did not in point of law give rise to a separate cause of action against one, the defendant in the case above supposed ought to be able to defeat the plaintiff's claim by showing that the promise sued upon was not the promise made, and that the promise which was in reality made was a joint one only, and as such did not give rise to the separate claim. This was exactly what the defendant attempted to do in the case of *Rice v. Shute* ('), but it was adjudged against him. In that case the judge who tried the cause, considered that a declaration upon a separate promise of the defendant, was not supported by proof of a joint promise by the defendant and another—that there was in consequence a variance between the allegation and the proof—and he nonsuited the plaintiff. This nonsuit the court set aside, and the language of Lord Mansfield is so instructive that I quote it ('): "To be sure, a distinction is to be found in the books between torts and assumpsits; that in torts all the trespassers need not be made parties, but in actions upon contract every party must be made a defendant. Many nonsuits, much vexation and great hindrance to justice, have been occasioned by this distinction. It must have been introduced originally from the semblance of convenience, that there might be one judgment against all who were liable to the plaintiff's demand. But experience shows that convenience, as well as justice, lies the other way. All contracts with partners are joint and several; every partner is liable to pay the whole. In what proportion the others should contribute, is a matter merely among themselves." And again, "It is cruel to turn a creditor round and make him pay the whole costs of a nonsuit in favor of the defendant, who is certainly liable to pay his whole demand, and who is not injured by another partner's not being made de-

(') 5 Burr., 2611.

(') 5 Burr., 2613.

fendant; because, what he pays he must have credit for in his account with the partnership." He then goes on to say "that he had consulted the other judges, and that [528 "they were all of opinion that the defendant ought to plead in abatement; he must then say who the partners are. If the defendant does not take advantage of it at the beginning of the suit and plead it in abatement, it is a waiver of the objection. He ought not to be permitted to lie by, and put the plaintiff to the delay and expense of a trial, and then set up a plea not founded on the merits of the cause, but on the form of proceeding." "No injustice is done to the defendant by allowing the plaintiff to recover, but great injustice is done to the plaintiff by allowing the nonsuit to stand." It is clear, therefore, that, although the defendant in such a case may, if he like, compel the plaintiff to discontinue his action and bring a fresh one against both, by means of a plea in abatement, there is yet a good cause of action against him which will sustain the verdict and judgment if that course be not followed.

This, therefore, might happen: the plaintiff upon a joint promise might bring and carry forward two actions *pari passu*, one against each of the joint contractors, and provided that neither of them chooses to plead an abatement (which they may have no object in doing, as it does not get rid of their liability) these actions may go on to judgment, and in neither of them, though the fact of the promise being joint only, and not joint and several, were to appear on the record, by bill of exceptions or otherwise, could the judgment be arrested or declared erroneous. Now if two judgments against two different defendants can be supported upon one joint promise, does not that show that there are in reality two causes of action involved in the breach of one joint promise; and if so, the principle upon which *King v. Hoare* (1) was decided, resting as it does upon the assertion that the joint promise gives rise to one cause of action and one only, cannot be sustained. The true position of the creditor would appear to be this; that he has a cause of action against either of his debtors separately or both together, subject to a plea in abatement? Now what is a plea in abatement? It is not a plea which affirms that the plaintiff has no cause of action, or that, having had one, it has been barred. It affirms only that the plaintiff is bound to pursue his remedy in another form of proceeding, and an [529 essential quality of it is that it should show that such form of proceeding is available to him. I will quote Mr. Chitty's

(1) 13 M. & W., 494.

description of it ('): "Whenever the subject-matter of the plea or defence is, that the plaintiff cannot maintain any action at any time whether present or future in respect of the supposed cause of action, it may, and usually must, be pleaded in bar; but matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should in general be pleaded in abatement (from the French *abattre*). The criterion or leading distinction between a plea in abatement and a plea in bar is, that the former must not only point out the plaintiff's error, but must show him how it may be corrected, and furnish him with materials for avoiding the same mistake in another suit in regard to the same cause of action, or in technical language 'must give the plaintiff a better writ.'"

By such a plea, therefore, either of the two joint contractors being sued alone, might insist upon the plaintiff bringing his action against both. But it is obvious that this right can only be exercised, on the part of both, by him who is first sued. If one of the two allows his liability to be enforced in a separate action, it is too late afterwards for the other, if sued, to plead in abatement, for he cannot give the plaintiff a better writ.

The conduct of his co-contractor in permitting the plaintiff to go on to judgment against him alone, has rendered a joint action against the two impossible. The plaintiff has no longer a joint promise upon which to sue the two; the promise of one having passed into *res judicata*. The technical grounds, therefore, upon which the decision in *King v. Hoare* (*) is based appear to me to be insufficient and unsatisfactory.

When the judges of the Queen's Bench, in the case of *Rice v. Shute* (*), under the guidance of Lord Mansfield, determined that a joint promise of several might give rise to a separate action against one only, contrary to the rule of law previously established that it could not do so (a rule which he said had led to "many nonsuits, much vexation, and great 530] hindrance to justice"), they *destroyed the basis upon which the court in *King v. Hoare* (*) built the decision, namely, that the second action was brought for the same cause of action as the first.

Passing from mere technical views, and regarding this rule of procedure in the light of convenience and fitness to promote the ends of justice, there is still less to be said for it. For it is to be observed, that the rule is unbending and

(1) 1 Chitty on Pleading, 7th ed., p. 462.

(2) 13 M. & W., 494.

(3) 5 Burr., 2611.

indiscriminate. No exception is permissible under it for a case in which one or more of several partners may be abroad, in which case the plaintiff must either wait to bring his action until they are all within the jurisdiction, or bring his action at once, at the cost of losing the responsibility of those who are out of the country. Nor is any exception possible for a case like the present; in which the plaintiff could not possibly sue all the partners at once, being ignorant that the defendant was one of them. In the first case the rule impedes and obstructs justice, and in the second, denies it altogether.

No doubt rules of procedure must be framed on general considerations, though they may work hardship in individual cases, and when a rule is once established, those who practice the law must be assumed to be aware of it, and frame their proceedings accordingly; but then the rule ought to be such that it can be acted on, and a rule that on a joint promise all partners must be sued jointly cannot be acted upon by one who does not know the existence of some of the parties liable, and so becomes a mere trap and pitfall which the creditor has no means of escaping.

But I must now advert to the Judicature Act. Assuming that the case of *King v. Hoare* was well decided in the then state of the law—a time when the defeat of just rights by non-joinder, or mis-joinder of parties, defects of pleading, and the non-observance of technical rules, was a matter of daily occurrence—a farther and most important question, in the present action, appears to me to be this: whether since the passing of the Judicature Act, and in a proceeding taken under that act, such a defence as the present can be maintained. Every provision and every line of that act prove it to have been based upon the broad principle of making forms, rules, and modes of procedure subordinate to the prime and *paramount object of reaching the justice of the case, and I should be surprised to find that a doctrine so wholly foreign to its spirit and objects as that upheld by the case of *King v. Hoare*(¹) had survived the sweeping changes in procedure which the Judicature Act introduced. I think I can show that it has not done so. That act abolished all the old forms of action; it abolished all the old technical forms of procedure, and established a new procedure for the enforcement indiscriminately of all legal and equitable rights, which is independent of all old rules of law on that subject. Particularly it did so with all objections and defences arising out of the mis-

(¹) 13 M. & W., 494.

joinder or non-joinder of parties, either plaintiff or defendant. Since that act no such thing as a plea in abatement is possible. The non-joinder of any party under any circumstances has ceased to be an answer, objection, or defence to the action. In such a case the action goes on, and "the court or a judge may, on such terms as appear to be just, order that the name of any party who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action, shall be added." This is the language of the rule 9 on procedure in the first schedule to the act of 1873.

Now these provisions appear to me to have entirely altered the rights of joint contractors in respect of procedure. They have no longer any absolute right to insist that they should be sued together or not at all. The creditor may bring and pursue his action against one or more of them, and if the defendants desire that others should be joined, they must apply to a judge, who will hear what is to be said on both sides and decide that additional parties shall, or shall not, be joined according to the requirements of justice, and not according to the election of the defendants, or any imperative rule that all who jointly contracted must be jointly sued.

The joint contractor having thus lost the right (for it was a right, and an absolute one, though only a right of procedure) to be sued only in conjunction with his co-contractor, he can no longer be heard to maintain either that his co-con-
532] tractor must be *sued with him, or that, it being impossible so to sue him by reason of his having been sued already, he is himself discharged. The necessary connection in matters of procedure which the law before the act had established (as Lord Mansfield said "for convenience") between the joint contractors, and had enforced by the plea in abatement, is now by the act severed and put an end to.

When the plea in abatement was swept away the legal right of a joint contractor to have the other joint contractor joined in any action brought upon the joint promise was swept away too, and the creditor became entitled to sue the parties severally, subject no longer to the will of the defendant, but to the discretion of the court exercised for the furtherance of justice.

And this again cuts the ground from under the doctrine of *King v. Hoare* (¹), in which case Baron Parke laid great stress upon the argument that if after the first action the

(¹) 13 M. & W., 494.

defendant could not plead in abatement, "he would be deprived of a right by the act of the plaintiff without his privity or concurrence in suing and obtaining judgment against the other."

Upon the whole, then, it seems to me that the right of persons making a joint promise to be sued jointly, first broken in upon by Lord Mansfield in *Rice v. Shute*⁽¹⁾, when he allowed an action to be maintained against one only of several joint contractors, was finally put an end to by the Judicature Act when the right to plead in abatement was withdrawn from them; and that the question properly arising in this case may be shortly dealt with as follows: The plaintiff sues for a debt which the defendant, originally at least, must be held to have owed him. The defendant answers that the debt was due from him jointly with others, and not otherwise, that the plaintiff's only right is to sue him jointly with the others—that he cannot sue the others now, having already done so, and that he has thus lost the only right of action he ever had. The answer to this is simple. Since the Judicature Act it is not true that the plaintiff's only right is to sue the defendant jointly with the others.

I will not occupy your Lordships time farther on the proper view to be taken in regard to the authorities in equity. I willingly adopt the opinions of the Lord Chancellor and others of *your Lordships much more competent than [533 I am to read those decisions aright, but for the reasons which I have given I think that the judgment of the court below ought to be reversed, and the plaintiff have judgment for his debt in this action.

LORD O'HAGAN: My Lords, I have had the opportunity of reading and considering the opinion which has been delivered by my noble and learned friend on the woolsack in this case; and I concur generally with the views he has expressed and the reasons by which he has sustained them.

There is no question of fact in the case; and in the argument at the bar it seemed to be conceded that unless the doctrines of a court of equity intervene to establish that the defendant Hamilton and his copartners McLay and Wilson may be dealt with as joint and several debtors and not as joint debtors only, the appeal must be dismissed.

The plaintiffs obtained judgment against Wilson & McLay whom they sued as their sole debtors, in ignorance that Hamilton was a partner, and, therefore, responsible for the payment of the debt; and it was asserted that the judgment so obtained was, at law, a bar to the suit against him, on the

(1) 5 Burr., 2611.

ground that the original cause of action had thereby passed "*in rem judicatam*," and could not be the foundation of any further proceeding. Unless your Lordships are prepared to overrule the decision in the case of *King v. Hoare*⁽¹⁾, the proposition cannot be disputed. That decision is clear upon the point, and it has been followed in a number of cases, and generally recognized by courts of law in accordance with the statement of Mr. Baron Parke, that "the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher;" and that the judgment bars it, "because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage, and it would be useless and vexatious to subject the defendant to another suit for the purpose of attaining the same result."

I do not deem it necessary to go further into a consideration of the grounds of that decision. They are stated in 534] the judgment *of the Court of Exchequer, and have been sufficiently explained by my noble and learned friends. On those grounds it seems to me sustainable, as well as on a view of the right which a joint debtor has, to be sued, with others, upon a promise made by him jointly with them, to whom his relations may be injuriously affected, if, a judgment having been obtained for the same cause of action, he cannot have the advantage which might otherwise have accrued to him for the purposes of contribution and account, and the establishment of joint responsibility.

The question is one of procedure, and the rule may operate harshly in conceivable circumstances. But it has been justified, from the desirableness of preventing repeated litigation for the same cause, and maintaining the claim of the debtor to have any such benefit as may accrue to him if, his liability being joint, he is required to answer jointly.

In this case the merits are certainly not with the defendant; but it is to be noted that the plaintiffs have had the opportunity of enforcing their demand against the persons with whom they meant to contract, and on whose credit only they made the sale and delivery of their goods. And I am afraid that rules of procedure (adopted because they are convenient and effective generally for assisting in the rightful administration of justice), from the imperfection of human tribunals will sometimes, in particular instances, be found to defeat equitable claims. But, be the merits as they may, I do not see sufficient reason for overruling a well considered judgment, sustained as it is by such considerations

(1) 13 M. & W., 494.

and such a series of authorities, and not assailed at the bar, so far as I remember, by any argument or suggestion on behalf of the appellants. As regards the operation of the principle recognized by the case of *King v. Hoare* (¹), it does not seem to me,—reserving the consideration of the effect to be given to the doctrine of equity on the joint and several liability of contractors,—that the Judicature Act meddles with that principle. The procedure is changed. The plea in abatement is abolished. The court is required to intervene where the parties to the action were formerly obliged to plead; but it does not seem to follow that the change in the machinery of enforcement alters the rights to be enforced or takes *from the joint contractor any privilege [535 which formerly belonged to him. It may be guarded in a different way, but I do not think it is abrogated by any express proviso or any necessary implication. It is clear, however, that the doctrine of *King v. Hoare* (¹) is not applicable, if the debt sued for be joint and several; and the real contention of the appellants has been that, although at law the contract in the case was joint, inasmuch as equity would have dealt with it, before the passing of the Judicature Acts, as joint and several, the appellants are entitled, under the 24th section of the act of 1873, to the same relief as would have been given to them by the Court of Chancery in a suit or proceeding instituted there.

Now, in the first place, in ordinary cases, and unless, in exceptional circumstances, a deviation from ordinary principles of construction has been allowed, a contract is construed in the same way by a court of equity and by a court of law; and it lies upon those who seek such a deviation to produce authority which may clearly justify it. The presumption is the other way. Here the contract at law was confessedly joint. The burthen of showing that, in equity, it was joint and several, lies upon the appellants.

It is conceded, that the precise contention which grounds the argument has never been sustained, in the exact circumstances to which it is now applied. In another state of facts, and as between parties having other relations than those of the plaintiffs and defendants, courts of equity have, not without difficulty and hesitation, dealt with a contract, joint at law, as joint and several. But if the distinction so established in a particular case, was meant to apply not merely to it but generally to all cases, it seems scarcely conceivable that the point should not have heretofore arisen, for it must have often been the interest of suitors to avoid, by a

(¹) 13 M. & W., 494.

recourse to equity, the embarrassments created by legal strictness as to joint contracts and their incidents.

A great many cases have been cited to your Lordships in which *dicta* of learned judges are embodied, and successive text-books seem to represent, without limit or qualification, that the debts of copartners are in equity joint and several. And if those *dicta* are to be taken without reference to the 536] subject-matters to which *they apply, they would undoubtedly countenance the contention of the appellants. But, as has been made very clear by my noble and learned friends, they have been in fact applied merely in cases of the administration of the assets of partners who have died. In those cases only has effect been given to them—for the purpose apparently of making the administration more full and equitable than it could have been if the debt had been held good, without a provision for the proportional discharge of liabilities out of the estate of the deceased in reciprocity with its claims on the estate of the survivors. Lord Justice James explains succinctly the equitable rule as to partnership contracts: “So far as regards partners when there is in equity no survivorship of property there is in equity no survivorship of liability.”

The reason of the rule, as far as it is ascertainable, has already been discussed. It is well explained in a passage from Lord Eldon, which has been cited by my noble and learned friend on the woolsack, and needs no further exposition. It is notable that Lord Eldon himself (*Ex parte Kendall* (¹)) expressed his surprise that “where parties think proper to enter into a joint instead of a joint and several contract, courts of equity have not left that to its fate as a joint contract.” He admits the force of the authorities deciding “that there is a remedy against the assets of one deceased if the survivor cannot pay,” but he admits it with apparent reluctance. He repeats, in the same case, referring to a doubt of Lord Thurlow upon the point, the expression of his own surprise “that a court of equity should have interposed to enlarge the effect of a legal contract.” And, again, he carefully confines the enlargement as warranting only “resort to the assets of a deceased debtor” (²). I see no valid ground for extending it further, and no sufficient reason for holding, according to the contention of the appellants that, in equity, all partnership contracts are, in all circumstances and for all purposes, joint and several. I think that Lord Justice Cotton correctly states the result of the cases; and that the effect of the

(¹) 17 Ves., at p. 518.

(²) 17 Ves., at p. 525.

judgment at law against Wilson & McLay is not done away by any equitable principle.

I have not adverted to the peculiar view presented to this House *by my noble and learned friend on the wool- [537 sack. It has originated with him, and was not suggested or discussed in the course of the argument. The House could scarcely act upon it, as against the appellants, without affording to their counsel the opportunity of considering, and, if possible, encountering it. I base my opinion, therefore, on the conclusions to which I have arrived with reference to the points mooted at the bar. I shall only say that, at present, I am disposed to concur with the Lord Chancellor, although the same objection as to the evil of giving procedure the effect of defeating a fair demand would apply as much to the result of his opinion as to the decision in *King v. Hoare* (*).

On the whole, for the reasons I have given, I think the appeal must be dismissed.

LORD SELBORNE: My Lords, the argument of the appellants was chiefly, if not wholly, founded upon the course of the Court of Chancery in the administration of the assets of a deceased person, who has been a partner in a trading firm, and upon the language held by several judges of high authority with respect to the equitable position of partnership creditors.

If that language were found to be technically exact, when tested by the practice of courts of equity, upon all occasions when the rights of partnership creditors have come in question, it might (perhaps) be a sound conclusion that its principle ought to be extended to such a case as the present, though no precedent directly in point has been produced. But the fact is otherwise. If every debt of a trading partnership were regarded in equity as, from its commencement, joint and several, in the proper sense of those words, there could be no reason why in bankruptcy, where equitable are regarded as much as legal rights, it should not have been treated in the same way as any other joint and several debt; nor why Lord Eldon should have made such a decree as he did in the case of *Gray v. Chiswell* (*). Nor do I think it possible that if, in equity, a separate debt due from a creditor of a firm to one of the partners could be set off against the debt of the firm, there would not have been ample authority for that proposition.

*If no rule had been established in equity, giving [538 partnership creditors a remedy against the assets of a de-

(*) 13 M. & W., 494.

(*) 9 Ves., 118.

ceased partner, it would have seemed clear, on principle, that in all these cases, when there was no mistake to be rectified in any written instrument, the legal contract between the creditor and the debtors was the only contract, and that its construction must be the same in equity as at law.

I conclude, therefore, that those expressions of eminent judges in which partnership debts have been spoken of as, in equity, joint and several, were not meant by them to be understood in the proper and technical sense of those words; and that they cannot safely be used to establish any rule or principle extending beyond those limits within which courts of equity have hitherto given, to creditors of a partnership, remedies which they could not have obtained at law.

It is undoubtedly true that the remedy which a court of equity gives to a partnership creditor, in the administration of the assets of a deceased partner, has the effect of preserving to him the liability of an estate which, by the survivorship of the co-debtor or co-debtors, has at law become exonerated. Great judges, such as Lord Eldon and Lord Thurlow, have felt difficulty in referring this course of practice to any very clear or satisfactory principle. It has been said to depend upon, or to arise out of, the adjustment of the rights and liabilities of the deceased and the surviving partners *inter se*; but this explanation does not, to my mind, remedy the difficulty, because, upon that principle, it would seem that the creditors ought to be limited, in each particular case, by the extent of the rightful claims of the surviving partners upon the deceased partner, and to be wholly excluded if the state of the accounts between them were such as to make it just to leave the whole liability where the law had cast it, viz., upon the surviving partners. The actual course of administration (subject to the distinction between a personal action and proof against assets) has been to give the creditor as large and unqualified a remedy against the estate of the deceased partner, as he would have had by action at law in his lifetime. There is (as it seems to me) only one really consistent explanation of this course of practice, when taken in connection with the rule in bank-539] ruptcy, and with *the general principles of law and equity, viz., that derived from the doctrine "*jus accrescendi inter mercatores locum non habet.*" As in several other well known classes of cases (of which mortgages and security bonds, with penalties, may be taken as examples), equity controls the operation of a legal contract so as to give effect to the purposes and objects to which it was meant to be subsidiary, so in these partnership cases it controls, *inter*

mercatores, the legal effect of survivorship. If that is the principle of the rule, it is one which arises upon death only. The partnership is dissolved by death; but in equity it is taken as still subsisting, for every purpose of liquidation, just as if it had been dissolved *inter vivos*, and the creditors are taken as still creditors of that partnership. What was before joint thus becomes several, by the dissolution, and by the exclusion in equity of the survivorship which takes effect in law; and although, when this rule was first established, it might well have been doubted whether it did not give creditors rights for which they had never contracted, there could be no doubt, after it had once become a settled rule, that the rights resulting from it were necessarily implied in all subsequent onerous contracts by copartners. For this purpose (and, as it seems to me, for this purpose only, and only by the operation of death) all such contracts may be described, as in equity, joint and several.

My conclusion is that in the present case there is no equity upon which the appellants can be entitled to be relieved from the legal effect of the judgment obtained by them against Wilson, McLay & Co., if (as the equitable argument assumes), that judgment had the effect of extinguishing, in the lifetime of all the partners, the legal liability of the respondent as a partner for the debt previously due from the partnership of which he was a member. There is no question here of *jus accrescendi*; the question relates simply to the constitution of the appellants' debt. Before the action it was a joint debt; but by the result of the action (if the decision in *King v. Hoare* (1) is right, and is applicable to this case), it became the separate debt of Wilson, McLay & Co. only. If the joint debt, for which alone the respondent was ever liable, was merged and extinguished at law by this judgment (on *which the respondent is [540 clearly not liable, either at law or in equity), it seems to me to be impossible that equity should, on that ground, raise or imply against him, out of the original contract, a separate liability to the appellants from which he is free at law, whatever may be the rights, by way of contribution, indemnity, or otherwise, which Wilson, McLay & Co. may possess against him in respect of this judgment.

Upon the legal question, I understand it to be the opinion of all your Lordships, that a second action cannot be maintained upon a cause of action which has once passed *in rem judicatam*: and that this principle is not affected by any of the changes of procedure introduced by the Judicature

(1) 13 M. & W., 494.

Acts. What I understand to be the view of my noble and learned friend opposite (Lord Penzance), is, that the cause of action, in this case, is *not the same* with that on which the judgment against Wilson, McLay & Co. was obtained. Apart from authority, I should myself have thought it clear that, if the contract was joint only, the cause of action *was* the same. The rule established in *Rice v. Shute* (¹), on whatever principle it may have been founded, was (I suppose) applicable to *all* cases of actions *against* one (or less than all) of several joint contractors; and not only to partnership cases. Unless, therefore, that rule justifies the conclusion that *all* joint contracts are in law several, as well as joint, until survivorship takes place by the death of one of the contractors, I cannot see how it tends to prove that there are, in such cases, more causes of action than one upon the same contract. If that conclusion were sound, it is by no means clear to my mind, that even a plea in abatement ought to have been allowed: nor can I imagine any reason why the same principle should not equally hold in the converse case, of an action brought by one of several persons *with* whom, jointly, a contract has been made; in which case (whatever may have been the ground of the distinction) the rule has been that a plea in abatement was not necessary; but that it was sufficient to make the defence of joint contract available, if the facts came out in evidence.

I, therefore, agree with my noble and learned friend on the woolsack, that the appeal in this case ought to be dismissed; but I have preferred to rest my own judgment [541] upon that view of the *facts of the case which was taken by the counsel on both sides and in the courts below.

LORD BLACKBURN: My Lords, in this case the plaintiffs entered into transactions with the firm of Wilson, McLay & Co., then consisting of two persons—Matthew Wilson and Joseph Corrie Shutters McLay. They, at the request of that firm, and in consequence of contracts made with that firm, accepted bills and entered into other transactions, the result of which was that a large sum was owing to the plaintiffs for which they might have maintained an action for money lent against those two persons.

The plaintiffs did not, at the time when they entered into the contracts which resulted in this cause of action, know that any other person was interested in the contracts; they dealt with Wilson & McLay, and with them alone, and gave credit to them alone. But afterwards (in the view which I take of the case, it is immaterial when) the plaintiffs discov-

(¹) 5 Burr., 2611.

ered that the defendant Hamilton had agreed to share with Wilson & McLay in certain adventures which would require the advance of money, and that "the financial arrangements should be managed" by Wilson & McLay.

This amounted to an authority to Wilson & McLay to borrow money for the joint account of Wilson, McLay & Hamilton, who were the undisclosed principals of Wilson & McLay in the contract of loan. And it is, I think, now firmly established as law that a person entering into a contract with one to whom, and to whom alone he trusted, may, on discovering that the contractor really had a principal, though he neither trusted to him nor gave credit to him, nor even knew of his existence, charge that principal, unless something has happened to prevent his doing so. He is not bound to do so. In the present case Wilson & McLay could not, if sued before the Judicature Acts, have pleaded in abatement the non-joinder of Hamilton; nor if Wilson & McLay had sued the plaintiffs could they have resisted a set-off of the money lent to them, on the ground that in borrowing it they were agents for a concealed principal.

I will first consider how this case would have stood at law before *the Judicature Acts, and then inquire what [542] difference these acts make. I take it, for the reasons I have given, to be clear that, under such circumstances as exist in the present case, the now plaintiffs might have maintained an action for money lent against Hamilton, on the ground that he, jointly with Wilson & McLay, being undisclosed principals to Wilson & McLay, was, as such, liable to the plaintiffs. But the facts are such that Hamilton could have proved a plea that the contract, on which he was sued, was made by the plaintiffs with the defendant, and Wilson & McLay, jointly, and not with the defendant alone, and that the plaintiffs, before action, had recovered judgment against Wilson & McLay for the same loan upon the same contract. And then the question would have arisen, whether a judgment recovered against one or more of several joint contractors was (without satisfaction) a bar to an action against another joint contractor sued alone. The decision in *King v. Hoare* (1) was that it is a bar.

I have already said that, in my view of the matter, it was immaterial when the plaintiffs first discovered that they had a right to have this recourse against Hamilton, which they had never bargained for, and which was to them a piece of pure good luck. If the principle on which *King v. Hoare* (1)

(1) 13 M. & W., 494.

was decided had been that, by suing some he had elected to take them as his debtors to the exclusion of those whom he had not joined in the action, it would be material; for I assent to the argument that there cannot be election until there is knowledge of the right to elect. But *King v. Hoare* ⁽¹⁾ proceeded on the ground that the judgment being for the same cause of action, that cause of action was gone. *Transivit in rem judicatam*, which was a bar, partly on positive decision, and partly on the ground of public policy, that there should be an end of litigation, and that there should not be a vexatious succession of suits for the same cause of action. The basis of the judgment was that an action against one on a joint contract was an action on the same cause of action as that in an action against another of the joint contractors, or in an action against all the joint contractors on the same contract.

From very early times it was the law that a contract was an entire thing, and that, therefore, all who were parties to 443] the contract *must, if alive, join as plaintiffs and must be joined as defendants. If this was not done there must be a plea in abatement (Com. Dig., Abatement, E. 12, F. 8). That very learned lawyer cites 7 Hen. 4, 6, and 20 Hen. 6, 11, as authorities for this, and probably earlier authorities might be found, but I think it unnecessary to search for them, as it has never, as far as I know, been doubted that the defendant might plead the non-joinder of his joint contractors in abatement, and in that way compel the plaintiff to join as defendants all who were parties to the joint contract and were still alive. But there was long a controversy as to whether the plea in abatement was the only way in which the objection could be raised. If on the evidence it was proved that the contract was joint, it was thought that there was a variance between the proof of a joint contract with the parties to the action, and some one not a party to the action and still alive, and the allegation in the declaration which, it was thought, must be taken to be an allegation of a contract between the parties to the action and no others, and consequently that there should be a nonsuit or verdict for the defendant on the ground of variance. This, it has now been settled, is the law in cases where the objection is the non-joinder of a plaintiff; and consequently the non-joinder of a co-contractor as plaintiff was never in modern times pleaded in abatement. And it was long thought by many that the same course was open to a defendant. Such was the decision of Lord Holt

(¹) 13 M. & W., 494.

and the Court of King's Bench in *Boson v. Sandford* (*). My Lords, I need hardly point out that if this had been still followed as law, it would have made it clear that the cause of action against the one was the same as that against all; or rather that there was no cause of action at all against the one alone, and never could be judgment against one alone; and so the point could never have risen. But it was established by a series of cases, which may be found collected in Serjeant Williams' note to *Cabell v. Vaughan* (*), that though all the joint contractors must be joined as co-defendants, the only way of taking advantage of the non-joinder was by a plea in abatement. The first case, in which I find this decided, was *Rice v. Shute* (*). The last in which I find it controverted, *though unsuccessfully, was [544 *Evans v. Lewis* (*), in 1794. But though the mode of enforcing the joinder of all was thus cut down, it still remained the law that all ought to be joined. And consequently I cannot doubt that the judges in *King v. Hoare* (*) were accurate in holding that the two actions were upon the same cause of action. I cannot agree in what seems to be the opinion of the noble and learned Lord on my left (Lord Penzance) that the Judicature Act has taken away the right of the joint contractor to have the other joint contractors joined as defendants, or made it a mere matter of discretion in the court to permit it. With great deference I think that the right remains, though the mode of enforcing it is changed.

I do not think the defence a meritorious one; but I think in the present case there is no great hardship. The plaintiffs had a right of recourse against Hamilton, for which they never bargained; but they did nothing inequitable in taking advantage of that which the law gave them. They have destroyed that remedy by taking a judgment against persons who turn out to be insolvent. I do not see that Hamilton does anything inequitable in taking advantage of the defence which the law gives him. The plaintiffs got a right by operation of law, without any merits of their own, by what, as far as regards them, was pure good luck. They have lost it by what was no fault of theirs, but was, as far as they were concerned, pure bad luck. If the plaintiffs were willing to take advantage of their good luck against the defendant, it seems no hardship that he should take advantage of their bad luck against them.

But in such a case as *King v. Hoare* (*), where the plain-

(*) 2 Salk., 440.

(*) 1 Wms. Saund., 290a.

(*) 5 Burr., 2611.

(*) 1 Wms. Saund., 291 (d); Bayley on

Bills, 381. See also Lord Ellenborough in *Mountstephen v. Brooke*, 1 B. & Ald., 226.

(*) 13 M. & W., 494.

tiff had contracted with the provisional committee of a company, and consequently was very uncertain how many were joint contractors, it did operate harshly. He dared not join many in the first action, for, as the law then stood, if he failed as to any one, he failed as to all; and it does seem hard that a judgment obtained under such circumstances against one should be without satisfaction a bar as to all the 545] others. This hardship is very much removed by *the provisions of the existing law, by which the plaintiff recovers judgment against those whom he proves to be his debtors, though he has joined others as defendants; he has only to pay the costs of those improperly joined. But I think that the hardness of the law, even if it exist, is a reason for altering it, not for refusing to act upon it; and I think no doubt has ever been expressed, unless perhaps in *Ex parte Waterfall* (¹), that *King v. Hoare* (²) does truly state the law as it existed before the Judicature Acts, and it was not doubted in the courts below, or I think seriously questioned at the bar, that it did so.

But since the Judicature Act, 1873, s. 24, law and equity are to be concurrently administered. And therefore if before the passing of those acts the plaintiffs could have sued in equity on these facts, or if they could have successfully applied for an injunction to prevent the defendant from pleading this defence, they may raise the same point in this suit in the Common Pleas Division. But the Judicature Acts do not create any equity applicable to this case which did not exist before. They only enable the court to administer the equities already existing without the delay and expense formerly required.

On the first argument at your Lordships' bar, Mr. Rigby, in a very excellent argument, convinced me that in cases of joint contracts there was no difference between law and equity, except in the single case of the death of one of the parties to a joint contract, where the contract was such that the maxim *inter mercatores jus accrescendi locum non habet* applied; but I was diffident of my opinion on a question of such pure, and I might say, technical equity; and was therefore very willing that the case should be re-argued.

I have now heard the opinion of the noble and learned Lords who are conversant with the proceedings in the courts of equity, and have no diffidence in saying that I am of the same opinion.

LORD GORDON: My Lords, this case is attended with very much difficulty, as is evinced by the difference of opin-

(¹) 4 De G. & Sm., 199.

(²) 13 M. & W., 494.

ion expressed amongst your Lordships. *I have [546 given it my most careful consideration with the advantage I have derived from a perusal of the judgments which have been delivered by your Lordships, and I have come to the conclusion that the judgment of the Court of Appeal was right, and should be affirmed.

Judgment appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 28th July, 1879.

Solicitors for appellants: *Freshfields & Williams.*

Solicitor for respondent: *John W. Sykes.*

See 30 Eng. R., 256 note.

A claim for necessities is merged in and extinguished by a judgment rendered in a suit upon the claim, and an action upon such a judgment is not a suit for necessities furnished, within the meaning of R. S., chap. 86, § 55; *Brown v. West*, 73 Maine, 23.

A manufacturing company filed a certificate reducing its capital stock, May 10, 1875.

The plaintiff recovered a judgment against the company upon notes given in October, 1875, for services alleged to have been rendered prior to the filing of the certificate. In this action brought by him to enforce an alleged individual liability of the stockholders:

Held, that the recovery of the judgment upon the notes estopped him from resorting to the original consideration, in order to charge the stockholders with the payment of the debt: *Sutherland v. Olcott*, 29 Hun, 161.

If a defendant served with process, who, during the action, is adjudged a bankrupt, would avail himself of his bankruptcy as a defence to the suit, he must make application for a stay as provided by the bankrupt act. If he neglects so to do and a judgment is rendered against him, he cannot afterwards, when he has obtained his discharge, base upon it the right to enjoin such judgment, but the judgment will merge the original cause of action, and become a new debt, not provable against the bankrupt's estate, and wholly unaffected by the discharge: *McLaughlin v. MacLachlan*, 12 Bradw. (Ills.), 631; *Boynton v. Ball*, 105 id., 627.

See, *Anderson v. Blumenthal*, 91 N. Y., 171.

A judgment against one of several

joint contractors at common law merges the contract, and thereby defeats an action thereon against the other parties thereto. But under the statute (R. S. 1256) a different rule prevails; a discontinuance may be entered as to a co-defendant not served, without affecting his liability in a subsequent action; and the same rule applies to parties who might have been made parties, but were not joined in the suit. Only such parties as are liable as indorsers, guarantors, or drawers of accepted bills are exempt from the operation of the rule above announced: *Wooters v. Smith*, 56 Texas, 198.

The death of a joint obligor only discharges his obligation in a case where it appears that he was a mere surety, who received no obligation whatever from the joint obligation: *Richardson v. Draper*, 87 N. Y., 837.

The defendant's testatrix guaranteed the performance of the covenants of a lease given by the plaintiff to her son, and agreed to pay any deficiency that might arise thereunder, and fully satisfy its conditions without requiring any notice of non-payment or proof of demand. Subsequently two joint notes were given for rent due upon the lease, signed by the testatrix and her son. Upon a claim made against her estate the lease and notes were proved. Held, that even if the estate of the deceased was not liable upon the notes for the reason that she had signed as a surety only, yet as it did not appear that the notes were received under an agreement that the testatrix should be discharged from liability upon her guaranty, that her liability under such guaranty continued and could be enforced after the maturity of the notes: *Raynor v. Laux*, 28 Hun, 35.

[4 Appeal Cases, 547.]

H.L. (Sc.), May 20, 1879.

[HOUSE OF LORDS.]

547] *CITY OF GLASGOW BANK IN LIQUIDATION.

THE five following cases, besides raising the general question as to the personal liability of trustees (which was decided adversely to trustees in the test case of *Muir v. City of Glasgow Bank*, ante, p. 337), also raised special grounds for the deletion of the trustees' names from the list of contributories.

1. CASE OF BELL, LANG, AND OTHERS.

Joint Stock Company—Unlimited Liability—Trustee—Companies Act, 1862, ss. 25, 78, 154, 196—Transfer of Shares—Note of Assumption of New Trustees on Stock Ledger.

In 1850 shares in the City of Glasgow Bank, which was a company registered, but not formed under the Companies Act, 1862, were transferred into the names of A. and three others as trustees and executors of a deceased trust. A. signed mandates to the bank authorizing the payment of dividends, sanctioned the purchase of additional bank stock, and signed the minutes of meetings of the trustees. On the voluntary winding-up of the company:

Held, affirming the decision of the court below, that A. was rightly put on the list of contributories.

Two surviving original trustees executed a deed assuming new trustees. Both new and old trustees passed an unanimous resolution to have stock standing in the names of the original trustees in the City of Glasgow Bank transferred into the names of the original and assumed trustees. A note of assumption, giving the names of all the assumed trustees, was made by the bank officials on the stock ledger following the account of the original trustees. All the trustees signed a minute of a meeting of the trustees, which stated that "Mr. Lang (one of them) tabled the scrip of the bank stock showing that the same had been transferred into the names of all the trustees original and assumed as directed at the previous meeting." At the winding-up of the company the names of the assumed trustees were placed on the list of contributories. In a petition for rectification:

Held, affirming the decision of the court below, that the assumed trustees, except one, a female trustee, who had been a minor, and unmarried at the date of the resolution to transfer, were properly on the list of contributories; and declared as to the sometime minor, that her name should *in hoc statu* be removed from the list, without prejudice to the right of the liquidators to place thereon the names of her husband and herself in her right.

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*2. ALEXANDER MITCHELL'S CASE.

Resignation of Office by Trustee after Stoppage of Company—24 & 25 Vict. c. 84, s. 1—30 & 31 Vict. c. 97, s. 10—Companies Act, 1862, s. 35.

If directors in the fair and *bona fide* exercise of their powers under the company's contract, as managers of the company, and in circumstances which make it a reasonable act of management, resolve not to record future transfers which may seriously affect and alter the liability of the partners, the resolution will be effectual, and

the directors in declining to record the transfers cannot be held to be in default within the meaning of sect. 85 of the Companies Act, 1862.

Before the commencement of the winding-up, but after the stoppage, and after the publishing of a notice by the directors calling a special general meeting of the shareholders of the City of Glasgow Bank, for the purpose of passing a resolution to have the bank wound up by reason of its irretrievable insolvency; and after a resolution by the directors that they would not record any future transfers, one of four trustees whose names appeared as such on the bank register resigned his office of trusteeship under 24 & 25 Vict. c. 84, s. 1, with the consent of his co-trustees and the beneficiaries. A notarial copy of the resignation was sent the next day to the bank, but the directors refused to alter the register by affixing a note, or in any other way:

Held, affirming the decision of the court below, that the resignation was too late to exempt the trustee from personal liability.

Per EARL CAIRNS, L.C.: The trustee's resignation of his trusteeship alone would not terminate his liability. He ceased to be a trustee; but it remained for him to terminate his liability in respect of the bank by a transfer, or something equivalent to a transfer, of his shares.

Per LORD SELBORNE: After the issuing to the shareholders and the public of a circular calling a meeting, with a view to the necessary resolution for a voluntary winding-up, it is too late for any shareholder to part with his shares, either to the copartnership itself or to any other person.

8. RUTHERFURD'S CASE.

Resignation of Trustees—Assuming of Beneficiaries as Trustees—Proceedings subsequent to notorious Insolvency of Company—Commencement of Winding up.

In 1873 the names of four trustees were entered on the register of the City of Glasgow Bank as members. On the 2d of October, 1878, the bank stopped payment. On the 5th of October the directors issued a summons convening a general meeting of the shareholders to pass a resolution for voluntary winding-up. On the 18th of October the original trustees assumed new trustees; resigned their office of trust; and executed a transfer. The directors refused to alter the register:

Held, affirming the decision of the court below, that the original trustees were personally liable, their resignation being too late.

Alexander Mitchell's Case (post, p. 567,) followed.

*4. BUCHAN'S CASE.

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Trustee entered on Register as Executor—Acting as Shareholder for over twenty years—Personal Liability—30 & 31 Vict. c. 97, s. 10.

A trustor under his settlement appointed three persons, A., B., and C., as his trustees, who were also to be his sole executors with his heritable and movable estate, which included City of Glasgow Bank stock. C. died, and the trustor executed a codicil appointing D. as trustee, and with the same powers as A. and B. The trustor having died in 1854, A., B. and D. accepted the trust; were confirmed executors, and were entered on the bank register as executors for the stock. D. sometimes signed the dividend warrants as "trustee," and once as "sole surviving trustee and executor." The bank suspended payment on the 2d of October, 1878, and on the 22d of October D. resigned his office of trustee:

Held, affirming the decision of the court below, that D. was personally liable, on the ground that more than twenty years before he had authorized the stock to be transferred into his name, and had ever since acted as a shareholder.

Held, also, the resignation was of no effect to escape liability.

Per EARL CAIRNS, L.C.: An executor whose testator has held shares in a joint stock company has generally one of two courses open to him. He may have the shares transferred into his own name, and become to all intents and purposes a partner in the company. He may, on the other hand, not wish to have the shares trans-

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Ker's Case. Cuninghame v. City of Glasgow Bank.

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ferred into his name, and he ought in that case to have a reasonable time allowed him to sell the shares, and to produce a purchaser who will take a transfer of them.

In any case where the bank transfers the shares into the name of the truster's executor, this House would require to be satisfied that the transfer had been authorized by a distinct and intelligent request on the part of the executor.

Per LORD SELBORNE: The case of trustees who take a transfer of shares in their names differs, in principle, from that of executors, who merely intimate their title as executors to a company, in order to claim and exercise the rights which belong to them as the legal representatives of their testator. . . . Trustees have not, in any proper sense of the word, a representative character, but executors have. . . . Having representative rights, it is impossible that they should not be entitled to produce the legal evidence of them to the company, for the purpose of having their title in some way recorded and recognized, without making themselves personally liable.

5. KER'S CASE.

Marriage Settlement—Transfer of Stock signed by Trustees—Dividend Warrant—Acting as Trustee—Non-intimation to Company of Resignation of Office.

In 1855 stock in the City of Glasgow Bank was transferred to trustees by an antenuptial contract of marriage. The law agent made a declaration of the contents of the deed, and notified it to the bank, who placed all the names of the trustees on the 550] register of shareholders, as trustees. The marriage *contract was not signed by any of the trustees; but they all subscribed subsequently a transfer of railway stock from the wife as executrix of one Bogle to themselves; and in this transfer they were described as "trustees nominated under and by virtue of the said antenuptial contract of marriage." In 1856 A., one of the trustees, signed a dividend warrant; and shortly afterwards he left the neighborhood. On the death of the husband in 1868, it being necessary to expedite confirmation to his estate, A. refused to act any longer, and sent to the law agent a formal letter declining his office of trustee, it was accepted by the other trustees, but not regularly intimated to, or acted upon, by the bank. A.'s name remained on the register until the stoppage of the bank on the 2d of October, 1878:

Held, affirming the decision of the court below, that A.'s name was rightly on the list of contributories, his acceptance of the trust being clearly established by his actings, extending over a long period of years; and that his resignation had not the effect of exempting him from personal liability.

[4 Appeal Cases, 607.]

H.L. (Sc.), July 1, 1879.

[HOUSE OF LORDS.]

607] *CUNINGHAME, *Appellant*; CITY OF GLASGOW BANK AND LIQUIDATORS, *Respondents*.

EARL EGLINTON and Others (Trustees), *Respondents*.

Company—Winding-up—Approval of Purchase of Stock by Trustee—Antecedent Authority to place Name on Register followed by subsequent Recognition—Liability in solidum, not pro rata parte only.

A., one of five trustees appointed under a marriage contract, signed with his co-trustees a note approving the purchase of stock in a joint stock banking company of unlimited liability. By the authority of the law agent of the trustees, acting on the note of approval, all the names of the trustees appeared in the transfers as accepting the stock, and in the register of members of the company. A. did not sign the

transfers, but he signed a subsequent letter to the company authorizing the payment of dividends. The company was wound up, and A. and his co-trustees were placed on the list of contributories as personally and individually liable for calls. In a petition at the instance of A. for rectification of the register and list of contributories:

Held, affirming the decision of the court below, that A. had authorized his name to be placed on the register. That the trustees were liable *in solidum* for the whole of the stock, and not *pro rata parte* for one-fifth part only.

Andrew Buchanan's Case in Lumsden v. Buchanan (4 Macq., 950; Court Sess. Cas., 8d Series, vol. iii, p. 89,) explained. See Lord Selborne's opinion.

APPEAL from an interlocutor dated the 21st of February, 1879, of the Court of Session, refusing a petition at the instance of the appellant John Charles Cunninghame, and another, to have the register of the City of Glasgow Bank and the list of contributories rectified by the deletion of the petitioners' names therefrom. The appellant and four other persons appeared on the bank register as holders of £1,450 stock as the trustees under the marriage contract of a Mr. and Mrs. Cunninghame. Two questions were raised in this appeal, (1) whether the appellant had authorized his name to be placed on the register of members, and if that question was answered in the affirmative; (2) whether the personal liability attaching to the appellant along with the other four trustees, is *in solidum* for the whole £1,450, or only *pro rata parte* for one-fifth thereof. The second question was abandoned *by the appellant at the bar. The facts [608 are sufficiently set out in the opinion of the Lord Chancellor.

Mr. *Herschell*, Q.C., and Mr. *Chitty*, Q.C., were heard for the appellant. They cited *Dr. Andrew Buchanan's Case*, in *Lumsden v. Buchanan* (*).

Mr. *E. E. Kay*, Q.C., Mr. *Benjamin*, Q.C., Mr. *Davey*, Q.C., and Mr. *Asher*, appeared for the respondents, the liquidators.

The Lord Advocate (Rt. Hon. W. Watson), and Mr. *John Pearson*, Q.C., appeared for the respondents, the trustees.

At the conclusion of the arguments on behalf of the appellant, the Law Peers delivered the following opinions:

EARL CAIRNS, L.C.: My Lords, it must be perfectly obvious to your Lordships, and must almost, I think, have been apprehended by the parties at the bar themselves, that the principles on which this House has proceeded in the former cases connected with this bank completely dispose of the present appeal. Indeed, the facts of the present case are, in my judgment, less favorable to the appellant than the facts in many of those previous cases were (*).

(*) Court of Sess. Cas., 8d Series, vol. ii, pp. 717, 723; 4 Macq., 950; see Lord Selborne's opinion, *post*, p. 612.

(*) *Ante*, p. 547.

1879

Cuninghame v. City of Glasgow Bank.

H.L. (Sc.)

It is only necessary that I should remind your Lordships that there being five trustees, as to whose appointment and whose consent to act there is no question, in the year 1875, certain trust funds belonging to the marriage settlement of Mr. and Mrs. Cuninghame fell to be invested. The spouses desired that a certain portion of those trust funds should be invested in bank stock of the City of Glasgow Bank, and a request for that purpose was signed on the 6th of August, 1875, by Mr. and Mrs. Cuninghame. It is addressed to the five trustees; it states that a sum of £12,100 of the trust funds is to be reinvested, and it requests the trustees in these words, that "you will authorize the same to be reinvested in stock of the following banks in your own names as trustees, at the price of the day," and among other investments mentioned, is "The City of Glasgow Bank, £1,450 stock."

609] *Now, that being a clear and distinct request to make the purchase in their own names, it is answered by the five trustees all signing in this way: "We hereby sanction and approve the above investments."

That being the request, and that being the answer, it is stated among the admissions, "that Mr. Thomas Strong, writer to the signet, Edinburgh, was the duly appointed law agent of the trustees;" that the bank stock was purchased, and that he (Strong) conducted the arrangements for the transfer of the bank stock; and it is stated that he "acted in the matter under the instructions and letter mentioned in the foregoing article," the letter and instructions being what I have already read, passing between the spouses and the trustees. Then it is stated that the "transfers were sent to the bank by Mr. Strong, acting as the law agent of the trustees, and under the instructions and letter before mentioned on the 11th of December, 1875, for the purpose of being registered in the books of the bank."

My Lords, I stop there for the purpose of saying that in law that was of course just the same thing as if those five trustees had themselves in their own persons walked to the bank with the transfers and had there actually registered them, themselves, in their own names. The letter which Strong sent with the transfers is this: "Referring to the latter part of your letter of the 8th, I now inclose three transfers of £1,450 stock (£450, £500, and £500), signed by a majority and quorum of the marriage-contract trustees of Mr. and Mrs. John Cuninghame (the purchasers), conform to accompanying printed schedule."

Now, turning to the transfer itself which was handed in,

it is in the usual form, and I have only to read a few lines from the central part—the trustees, the Earl of Eglinton, John Charles Cunningham, William Blair, Frederick Blair, and Montgomerie, “by acceptance hereof, being in terms of the contract of copartnership of said bank, subject to all the articles and regulations of the said company in the same manner as if they had subscribed the said contract”—that is the contract with the bank. It does not say that they have become subject to the conditions of the copartnership by their executing the transfer, but by their acceptance of the transfer which was made to them. That acceptance *may be in many ways besides the execution of a [610 deed. The deed, we find, was executed by a quorum of the trustees, but, as I said, it was accepted by the whole five through their act in taking it as their deed, their instrument of title, and asking the bank to act upon it by transferring the shares into their own names.

That being what was done towards the bank, and that instrument having been sent in, stating that they accepted this stock “subject to all the articles and regulations of the said company in the same manner as if they had subscribed the said contract,” let us see what the articles of the company in fact say—Articles 37 and 38 are referred to—Article 37 says, “Where the shares of any partner are transferred, conveyed, or sold, in terms of the above articles, and that either by the partners or directors, the deed of transference thereof shall be prepared by such person as the ordinary directors may appoint at the head office in Glasgow, in such form and terms as the said directors may from time to time appoint.” Then the 38th article says: “The said deed of transference, as also every assignment of shares in security, or *mortis causa*, and confirmations thereof by right of succession, shall, after being completed, be recorded in a book to be kept for that purpose.” I stop there for the purpose of saying that I do not read these words “after being completed” as meaning of necessity after being executed by every transferee. It may be completed as between the transferor and the transferee by the execution of the transferor if the transferor does not require more to be done, if he is satisfied that the transferee has accepted and chooses to rest upon the rights which will follow from that acceptance. The article, then continues: “shall be recorded in a book to be kept for that purpose, and such deeds, transference, assignments, and confirmations shall be delivered or returned to those in right of the same, after having marked thereon a certificate of the registration thereof; and it is

hereby declared that the production of such writings to the said manager or ordinary directors, for the purpose of registration, shall, *ipso facto*, infer" (that is, infer towards the bank, not towards the transferor; he and the transferee had settled between themselves before: it means infer towards the bank) "the acceptance of the capital stock therein specified, and the liabilities of the parties having right to the 611] same as partners of the company." *I have pointed out to your Lordships that by sending in the transfer those who sent it in agreed to take the shares according to whatever were the provisions of the contract of copartnery, and this, which I have read, was one of them.

Now, my Lords, to that I will only add that, after this was done, I find this further document executed by four of the trustees, including the present appellant. It is dated the 13th of December, 1875, and it is addressed to the secretary of the City of Glasgow Bank:

"Sir,—With reference to the sum of £1,450 of the capital stock of the City of Glasgow Bank, *standing in our names* as trustees under the contract of marriage between John Cunninghame, Esq., residing at the Pavilion, Ardrossan, in the county of Ayr, and Mrs. Mary Blair, or Cunninghame, dated 21st of April, 1873, we hereby request that, until further instructions, the dividend warrants on said stock may be made payable to Mrs. Cunninghame."

My Lords, I have never seen in my recollection of joint stock cases, a case in which the *catena* of the title was so complete in every substantial point as it is here. The only thing that can be suggested as not being present is the formal imposition of a signature by the appellant to the deed of transfer. That, my Lords, seems to me to be the purest form, the merest ceremony, and the want of it can have no substantial operation whatever in the present case. You have from a time antecedent to the purchase of the stock the declared intention, consent, and authority of every trustee to buy this stock and to have it placed in their own names. You have every step taken which was thought necessary by the bank, or by any person else, to procure the stock to be transferred into their names—you have it actually transferred in the books of the bank into their names—and you have under their own hand an immediate recognition by the present appellant and his co-trustees that it was so transferred, and you have them at once entering into the enjoyment of the property transferred by drawing dividends.

My Lords, that really is a case which is not susceptible of argument. I need not go into the other part of the case as it was not relied upon at the bar. I have only to submit to your Lordships that the appeal should be dismissed with costs.

LORD HATHERLEY concurred.

*LORD O'HAGAN: My Lords, unless we are pre- [612
pared to ignore a series of decisions unanimously pronounced by the Court of Session, and unanimously affirmed by your Lordship's House, we cannot hesitate to adopt the proposal of my noble and learned friend on the woolsack.

This is, in my opinion, a stronger case than most of those with which we have had heretofore to deal. We have here an antecedent sanction and authority, which has not merely a general reference to what was to be done, but is a distinct approval of an investment, which is expressly stated and clearly described. That appears to me to involve in it an authority for the investment, with all its incidents, one of which was to put the investors on the register. That antecedent authority was followed by subsequent recognition in the letter of mandate which has been read by my noble and learned friend on the woolsack, at once establishing the appellant's full knowledge of the transaction which had been so antecedently authorized—and the application of it for the purposes of the trust. Under those circumstances, I am clearly of opinion that we have no alternative but to affirm the judgment of the court below.

LORD SELBORNE: My Lords, I am also of the same opinion.

I should like to make one observation, and one only, upon the case which has been relied upon in the argument, namely, the case of *Lumsden v. Buchanan* (1), so far as regards Dr. Andrew Buchanan. It is not at all necessary to consider to what extent and for what purposes that ought to be regarded as an authority which this House would hold to be binding upon itself, in a case similar in its circumstances; but it may be useful to guard against the citation of that case as an authority for purposes to which it is certainly inapplicable, and I therefore think it worth while to take notice of what I suppose to have been the ground of that decision. The House, I suppose, considered that every entry upon a register ought to have reference to some title; that the antecedent title there was shown to be that of the other *trustees, not including, either by name, or by [613
reference, or by any collective form of designation, Dr. An-

(1) 4 Macq., 950; Court Sess. Cas., 3d Series, vol. ii, p. 723.

drew Buchanan; and probably the House may have thought that there might have been too much confusion and uncertainty and misconception as to the effect of the form of registration adopted, to make it safe to attribute it to any other title than that which was actually produced, a title not extending to Dr. Andrew Buchanan. That I have always supposed to be the ground of the decision—the House did not think there was any transfer intended; and it could not possibly have thought, on the facts before it, that the deed of accession, by which the other trustees agreed to take the shares from the company, was subscribed by or on behalf of Dr. Andrew Buchanan. Under these circumstances the House seems to have disregarded the registry, although it was perfectly well known to Dr. Andrew Buchanan and acted upon by him, because they could not connect it with the antecedent title.

LORD BLACKBURN: My Lords, I am entirely of the same opinion. I take it that under the act of 1862, when a name is entered upon the register, a person entitled as a shareholder is *prima facie*, until the contrary is proved, to be taken as a shareholder. Sect. 23 of the same act says, “that every other person who has agreed to become a member of a company under this act, and whose name is entered on the register of members, shall be deemed to be a member of the company.” The question, therefore, comes to be, whether it is shown that Mr. Cuninghame (the appellant in this case) had agreed to become a member of this company. In the case of *Lumsden v. Buchanan* (¹), as I understand the facts to have been there, the House of Lords, although there is scarcely a word said in their judgment about the case of Dr. Andrew Buchanan, seem to have come to the conclusion that he was not shown, as a matter of fact, to have intended to become a shareholder. If so, that may have been quite right on the facts of the case, or it may even have been a mistake upon the facts of that case; but it does not govern another case where the facts are quite different.

Here Mr. Cuninghame agreed to become a shareholder [614] in every way in which any man can agree. He, under his own hand, authorized the buying of the shares in his name, by his agent, who had authority to act in his behalf; he caused the documents to be drawn up in such a way that the shares would be transferred into his name by his agent. Again, he wrote to the company, saying that only three, which was a quorum, had signed the transfer; and asking

(¹) 4 Macq., 950; Court Sess. Cas., 3d Series, vol. ii, p. 723.

them, though not in these precise words, to register the names of the five trustees, inasmuch as a quorum had signed. Immediately after that, he with his own hand wrote a letter, saying that the shares were now standing in his name, and asking that the dividend upon them should be paid in a certain way. Stronger evidence that he directed his name to be entered upon the register and agreed to be a shareholder I cannot conceive. If the learned counsel for the appellant had been able to show that there was any principle of the law of Scotland, or of the general law, which said that a man cannot be held to have become a shareholder in a company without signing his name to a transfer, that would have been another affair; but there is no pretence for saying that there is any such rule of law, and I think that the terms of the 38th section of the articles of the City of Glasgow Bank do not mean that. Even if they did, I do not think it would lie in the mouth of any one, after the transfer had been made and had been acted upon for some time, and after the creditors had had an opportunity of seeing it, to say that it should have the effect of controlling the act of Parliament.

LORD GORDON concurred.

Interlocutor appealed against affirmed; and appeal dismissed, with costs.

Lord's Journals, 1st July, 1879.

Agent for appellant: *William Robertson.*

Agents for respondents, the liquidators: *Martin & Leslie.*

Agent for respondents, the trustees: *Preston Karslake.*

[4 Appeal Cases, 615.]

H.L. (Sc.), May 20, 1879.

[HOUSE OF LORDS.]

***TENNENT, Appellant; THE CITY OF GLASGOW BANK [615 AND LIQUIDATORS, Respondents (')].**

Company—Stoppage—Action to rescind Contract on the Ground of Fraud—Commencement of Winding-up—Companies Act, 1862, ss. 18, 38, 84, 130.

Since 1873 A. had appeared on the register of a joint stock banking company as the holder of £6,000 of stock. On the 2d of October, 1878, the bank stopped payment. On the 5th of October the directors issued circulars summoning an extraordinary general meeting to pass a resolution to wind up the company. On the 18th of October a report made by independent investigators was sent to all the shareholders,

(¹) Affirming 16 Scot. L. R., 238; Court Sess. Cas., 4th Series, vol. vi, p. 554.

which showed that the insolvency of the company was of such an overwhelming character that large calls would have to be made to meet its liabilities. On the 21st of October A. raised an action for reduction of his contract to take stock, on the ground that he was induced to purchase by the fraudulent misrepresentation of the directors. The summons in this action was served on the company on the same day. On the 22d of October an extraordinary resolution to wind up the company voluntarily was passed. A. was put on the list of contributories. In a petition by A. for rectification of the register and list of contributories based on the action of the 21st of October :

Held, affirming the decision of the court below, that the rights of innocent third parties had intervened; and that A.'s action for reduction of his contract was too late to exempt him from liability.

APPEAL from an interlocutor of the Court of Session, refusing to remove the name of the appellant, Mr. Hugh Tennent, from the list of contributories and from the register of the City of Glasgow Bank. The bank was established in 1839.

The original capital was £750,000, divided into shares of £10 each. In November, 1857, the bank temporarily stopped payment for a short period. In 1858 the shares were converted into stock; and in 1873 additional capital was created, making the total capital of the bank £100,000. By the articles of copartnership the shareholders' liability was unlimited, and the directors had power to purchase the shares of the bank (clause 32), and no one not a director was entitled to examine the books of the company *(clause 44). In 1862 the bank was registered under the Companies Act of that year.

Since 1873 the appellant's name has appeared on the register of shareholders as the holder of £6,000 of stock. He acquired this stock at three different times, namely, in December, 1872, from a Mr. Thomas Matthew, £2,500 of stock at the price of 207 per cent.; in July, from a Mr. Dugald Bell, another £2,500 of stock at 212 per cent.; and on the 21st of August he took directly from the bank £1,000 of new stock, which was then created, at £200 per cent. For this stock Mr. Tennent was registered the owner, and stock certificates certifying this had been done were sent to him by the bank. The two transfers were executed by Matthew and Bell "in trust;" and it was alleged they held the stock as trustees for the bank.

Previous to October, 1878, the appellant took no steps to relieve himself of these three contracts.

On the 2d of October, 1878, the bank suspended payment, and its stoppage on account of its insolvency was notorious throughout the United Kingdom.

On the 5th of October the directors, by means of circulars and advertisements, gave notice of an extraordinary general

meeting to be held on the 22d of October with a view to wind up the bank.

On the 18th of October a report on the state of the bank's affairs which had been obtained from independent investigators, was sent to all the shareholders, and was published in the newspapers on the 19th of October. This report disclosed, what the directors had known before, that the bank as a corporation was irretrievably insolvent, and could only pay its debts by making large calls.

On the 21st of October the appellant raised in the Court of Session an action against the City of Glasgow Bank, and also against Matthew and Bell, concluding for reduction of the transfers, entries in the bank books and stock certificates in his favor as holder of the above stock on the ground of fraud. He reserved right of action for the price paid for the stock. The summons in this action was served on the bank on the same day, the 21st of October, which was one day before the passing of the resolution to wind up voluntarily.

On the 22d of October an extraordinary resolution was passed *to wind up the bank voluntarily; and liqui- [617
dators were appointed. Subsequently a list of contributories was made up, in which the appellant's name was placed. On the 27th of November the voluntary liquidation was placed under the supervision of the court in terms of the Companies Acts, 1862 and 1867.

On the 8th of December the appellant raised a supplementary action of declarator, and damages against the liquidators and the bank for, *inter alia*, removal of his name from the lists.

The liquidators having refused to remove the appellant's name from the list of contributories, he, on the 13th of December, presented a petition to the Court of Session for rectification of the bank register, the removal of his name from the list; and to stay proceedings for enforcement of calls.

In the action for reduction and in the petition the appellant substantially averred that he was induced to become a partner of the bank and to purchase all the three parcels of stock by the false and fraudulent representations, and the fraudulent concealment made by the City of Glasgow Bank. That at and prior to the time of the respective dates of the transfers and purchases, the bank was in a state of absolute and hopeless insolvency, the debts of the company enormously exceeding its assets; but the bank regularly issued reports or balance-sheets falsely stating that it was in a con-

dition of great prosperity, and fraudulently concealed its true condition from the appellant. That the shares transferred by James Matthew and Dugald Bell, though nominally held by them, truly belonged to the bank itself; and it was for the bank that they held them in trust and transferred them to the appellant. Also that it was the practice of the directors, for the purpose of concealing the fact that the bank was a large holder of its own stock to take transfers for behoof of the bank in favor of Matthew and Bell, and that these transfers were expressed to be taken "in trust," but the trust for the bank was not disclosed on the face of the transfers, or of the stock ledger. The appellant further alleged that he had no means of discovering the fraud practised on him by the bank until its stoppage.

The liquidators contended that, whatever might have been the appellant's rights had he taken steps to avoid his contract while the City of Glasgow Bank was a going concern, he could not be allowed to do so when he took no steps to avoid the contract till after the known irretrievable insolvency of the bank; the rights of innocent third parties had intervened; and *restitutio in integrum* was no longer possible.

On the 22d of January, 1879, the First Division of the Court of Session, refusing the prayer of the petition, held that the action raised on the 21st of October came too late after the bank had stopped payment and had declared its insolvency (').

On appeal.

April 4. Mr. Southgate, Q.C., Mr. Macnaghten, and Mr. Whitehouse, for the appellant, contended that there was no question as to the facts, and it was not disputed that the appellant was induced to purchase the shares by fraud, the only question to decide was simply the time when the action could be successfully brought for rescission of the contract. They maintained that a person induced by the fraud of a company to become a member of that company was entitled to be relieved from the contract of membership, although the company might be in liquidation, provided he had rescinded the contract, and rescinded his shares, on discovering the fraud, and had actually commenced legal proceedings to enforce the rescission of the contract before the commencement of the winding-up. And here the appellant at the earliest moment after the discovery of the fraud practised on him, took action to rescind the contract, and

(') Soot. Law Rep., vol. xvi, p. 238; Court Sess. Cas., 4th Series, vol. vi, p. 554.

this he did before the commencement of the winding-up, which commenced at the date of the resolution. From the passing of the resolution only the right of creditors accrued as against equally innocent shareholders.

[They relied on *In re Reese River Company, Smith's Case* ⁽¹⁾; they also commented on *Oakes v. Turquand* ⁽²⁾; *In re Smith, Knight & Co., Weston's Case* ⁽³⁾; opinion of Lord Justice Brett in *Stone v. City and County Bank* ⁽⁴⁾; *Webb v. Whiffin* ⁽⁵⁾; *Henderson v. Lacon* ⁽⁶⁾; *Henderson v. Royal British Bank* ⁽⁷⁾, *which did not apply here; [619 *In re Whitehouse & Co.* ⁽⁸⁾; *Addie v. Western Bank of Scotland* ⁽⁹⁾; *Re Cleveland Iron Company, Ex parte Stevenson* ⁽¹⁰⁾; Companies Act, 1862, ss. 18, 38, 129, 130, 131.]

Mr. *E. E. Kay*, Q.C., Mr. *Benjamin*, Q.C., Mr. *Davey*, Q.C., and *Kinnear*, for the respondents, contended that it was undoubtedly the law in England and Scotland that a contract induced by fraud was not void but voidable, and the rights which exist in favor of the defrauded party to avoid the contract might be defeated by (1) his own delay in exercising the right; (2) the intervention of the rights of innocent third parties, as here; and (3) such a change of circumstances as render it impossible to restore matters to their former position: see *Clarke v. Dickson* ⁽¹¹⁾; *Oakes v. Turquand* ⁽¹²⁾; *Reese River Company v. Smith* ⁽¹³⁾. *Oakes v. Turquand* did not lay down the rule that the winding-up order, or the presentation of a petition to wind up, was the *punctum temporis* at which the rights of creditors intervene; on the contrary, in that case *Henderson v. Royal British Bank* ⁽¹⁴⁾ was expressly adopted, in which Lord Campbell said it would be monstrous if a person became a partner, and having so remained until the stoppage could afterwards repudiate liability; he also said that the rights of creditors became inchoate when the bank stopped payment; and that was the opinion of all the conferring judges of the common law courts. It could not be denied that at least on the 6th of October it was in the power of any creditor to file a petition for judicial winding-up, and prevent that which was now attempted. The circular convening the meeting was an acknowledgment in the words of the 79th

⁽¹⁾ Law Rep., 4 H. L., 64; Law Rep., 2 Ch., 604.

⁽²⁾ Law Rep., 2 H. L., 325.

⁽³⁾ Law Rep., 4 Ch., 20.

⁽⁴⁾ 3 C. P. D., 282, p. 309; 30 Eng. R., 156.

⁽⁵⁾ Law Rep., 5 H. L., 711, at p. 734.

⁽⁶⁾ Law Rep., 5 Eq., 249.

⁽⁷⁾ 7 E. & B., 356, at p. 364; 26 L. J. (Q.B.), 112.

⁽⁸⁾ 9 Ch. D., 595, 599; 26 Eng. R., 372.

⁽⁹⁾ Law Rep., 1 H. L., Sc., 145.

⁽¹⁰⁾ 16 W. R., 95.

⁽¹¹⁾ E. B. & E., 148.

⁽¹²⁾ Law Rep., 4 H. L., 64.

⁽¹³⁾ 7 E. & B., 356; 26 L. J. (Q.B.), 118.

section of the Companies Act, 1862, that the company was unable to pay its debts. The creditors had not lost their rights because they held their hand on the assurance of the directors.

[They cited also *Kent v. Freehold Land and Brickmaking Company* (1); *Allin's Case* (2).

620] *Mr. Southgate, Q.C., in reply.

May 20. EARL CAIRNS, L.C.: My Lords, the facts of this case lie in a very narrow compass.

The appellant is the holder of £6,000 stock in the bank; £5,000 of this stock he bought in the years 1872 and 1873 from trustees who held it for the bank, and £1,000 was allotted to him by the bank in 1873. After the bank stopped payment, as your Lordships have heard in the other cases, the directors employed accountants to make a report on the affairs of the bank. This report was made on the 18th of October, 1878, and was on that evening sent by post to the shareholders. The appellant received his copy of the report on the 19th of October, and thereupon he discovered, as he alleges, that he had been induced to take the stock in the bank by fraudulent misrepresentations of the directors. The 20th of October was a Sunday, and on the 21st of October he commenced an action in the Court of Session for reduction of his contract as a shareholder with the bank. The resolutions to wind up the company voluntarily were passed on the following day, the 22d of October; and on the 13th of December, the name of the appellant having been put by the liquidators on the list of contributories, he presented a petition to have his name removed, which petition was refused, and hence the present appeal.

My Lords, I ought to assume, and will assume for the present purpose, that whatever difficulties arising from lapse of time and other circumstances might, as between the appellant and the bank, lie in the way of his succeeding in the action of reduction he has instituted, he would have been entitled, had the bank been a going concern, to have succeeded in the action. The question is, can he succeed in rescinding his contract after the bank has stopped payment?

The Lord President (1) states that the law upon this subject is contained in three propositions. In the first place, a contract induced by fraud is not void, but only voidable at the option of the party defrauded; secondly, this does not mean that the contract is void till ratified, but

(1) Law Rep., 3 Ch., 493.

(1) Scotch Law Rep., vol. xvi, p. 241;

(2) Law Rep., 16 Eq., 449, at pp. 454, Court Sess. Cases, 4th Series, vol. vi, 455; 6 Eng. R., 805. p. 538.

it means that the contract is valid till rescinded; and thirdly, the option to void the contract is barred *where inno- [621] cent third parties have, in reliance on the fraudulent contract, acquired rights which would be defeated by its rescission.

Upon the two first of these propositions there cannot, I should think, be any dispute, and none was raised in the argument at your Lordships' bar. Nor was there any dispute as to the principle of the third proposition. The only question was to its precise wording, and the extent and mode of its application.

The case of *Oakes v. Turquand* (*) in this House has established that it is too late, after winding-up has commenced, to rescind a contract for shares on the ground of fraud. This, no doubt, is on the grounds stated by the Lord President, that innocent third parties have acquired rights which would be defeated by the rescission. The case of *Oakes v. Turquand*, however, while it decided negatively that a contract could not be rescinded on the ground of fraud after a winding-up had commenced, did not decide affirmatively the converse proposition, that up to the time of the commencement of a winding-up a contract to take shares could be rescinded upon the ground of fraud. Whether it can or not be so rescinded up to that time must, I think, depend upon the particular circumstances of the case.

In an ordinary partnership, not formed on the joint stock principle, it is impossible, as a general rule, for a partner at any time to retire from or repudiate the partnership without satisfying, or remaining bound to satisfy, the liabilities of the partnership. He may have been induced by his copartners by fraud to enter into the partnership, and that may be a ground for relief against them, but it is no ground for getting rid of a liability to creditors. This is the case whether the partnership is a going concern, or whether it has stopped payment or become insolvent. In the case of a joint stock company, however, the shares are in their nature and creation transferable, and transferable without the consent of creditors, and a shareholder, so long as the company is a going concern, can, by transferring his shares, get rid of his liability to creditors, either immediately or after a certain interval. The assumption is that, while the company is a going concern, no creditor has any specific right to retain the individual liability of any particular shareholder.

*It is on the same or on a similar principle that, so [622] long as the company is a going concern, a shareholder who

(*) Law Rep., 2 H. L., 825.

has been induced to take up shares by the fraud of the company has a right to throw back his shares upon the company without reference to any claims of creditors. He would have a right to transfer his shares without reference to creditors. The company, as a going concern, is assumed to be solvent, and able to meet its engagements, and to have a surplus, and the company being solvent, its duty to pay the repudiating shareholder what is due to him, and to take the shares off his hands, is an affair of the company and not of its creditors.

But if the company has become insolvent, and has stopped payment, then, even irrespective of winding-up, a wholly different state of things appears to me to arise. The assumption of new liabilities under such circumstances is an affair not of the company but of its creditors. The repudiation of shares which, while the company was solvent, would not or need not have inflicted any injury upon creditors must now of necessity inflict a serious injury on creditors. I should, therefore, be disposed in any case to hesitate before admitting that, after a company has become insolvent and stopped payment, whether a winding-up has commenced or not, a rescission of a contract to take shares could be permitted as against creditors.

But in the case before your Lordships the facts are extremely peculiar, and I do not think that your Lordships, in affirming the judgment of the Court of Session, will find it necessary to lay down any general rule extending beyond the particular facts of the present case. The bank stopped payment on the 2d of October and never resumed business, its stoppage being caused by insolvency. It is admitted that the directors knew at the time of the stoppage that the insolvency of the bank was irretrievable. On the 5th of October the directors convened an extraordinary general meeting of the shareholders by advertisement for the 22d, for the purpose of considering, and, if thought fit, passing extraordinary resolutions under the Companies Act for the purpose of winding up the bank voluntarily by reason of its insolvency. These were steps taken by the directors of the bank as the agents and representatives of the shareholders, and there was imposed upon the shareholders whatever responsibility may fairly be inferred from the steps so taken. Now at this time, and for several days after, indeed [623] *until the 21st of October, the appellant was to all intents and purposes a shareholder in the bank, not having taken any steps to disaffirm his contract, and the directors during this time were and were acting as his agents.

I have already had occasion to point out to your Lordships in other cases what appeared to me to be the necessary consequence of the steps which the directors thus took. The bank having stopped payment, and its insolvency being well known, it was scarcely within the bounds of possibility that, if nothing had been done by the directors, the creditors, or some one creditor, should not, within a few days after the 2d of October, have presented a petition for the winding-up of the bank, and with the presentation of such a petition the winding up of the bank would have commenced, and the repudiation of any share would, according to the case of *Oakes v. Turquand* (¹), have become impossible. It was the action of the directors, taken in the interest of the shareholders, including the appellant, and taken under the authority of the 46th article of the deed of the company, which, by holding out to the body of creditors the prospect of a voluntary winding-up, stayed the hands of the creditors from proceeding to a compulsory winding-up, and in my opinion it became impossible, after the advertisement of the 5th of October, for the body of shareholders in the company, whose agents the directors were, to make any alteration in their status, whether by a transfer or by a repudiation of shares, which would affect the rights of creditors in the company.

This consideration alone seems to me to be sufficient to dispose of the present appeal, and I have to move your Lordships that the appeal be dismissed with costs.

LORD HATHERLEY, LORD SELBORNE, and LORD GORDON, concurred.

Interlocutor appealed against affirmed ; and appeal dismissed with costs.

Lords' Journals, 20th May, 1879.

Agent for appellant: *J. McDiarmid*.

Agents for respondents: *Martin & Leslie*.

(¹) Law Rep., 2 H. L., 325.

[4 Appeal Cases, 624.]

H.L. (Sc.), May 20, 1879.

[HOUSE OF LORDS.]

624] *NELSON MITCHELL, Appellant; CITY OF GLASGOW BANK AND LIQUIDATORS, Respondents (').

Company—Refusal to register Sale of Stock after known Insolvency—Companies Act, 1862, s. 35—Sale of Stock—Registered Proprietor not set forth—Statute 30 Vict. c. 29 (Leeman's Act).

On the 28th and 30th of September, 1878, a shareholder in a joint stock banking company sold, through his broker in the usual course of business, on the Glasgow stock exchange, his shares for settling-day, the 16th of October. The name of the person in whose name the stock stood in the books of the company was not made known to the purchasers, nor were the shares marked by numbers, but the holders on the day of sale sent contract notes intimating the sale and purchase to their respective principals. On the 2d of October the company suspended payment, and the directors knew that its insolvency was irretrievable. On the 5th of October an extraordinary meeting of the company's shareholders was summoned by circular for the 22d, to pass a resolution to wind-up the company voluntarily, on account of its insolvency. On the 11th of October the seller was informed that the company had been the purchasers, they having the power to purchase their own stock by their articles of copartnership. On the 15th of October the company refused to prepare a transfer of the stock to themselves; and on the 18th they refused to register a unilateral deed of transfer which was delivered to them by a notary public. On the 19th the shareholder presented a petition for rectification of the bank's register by the deletion of his name therefrom. On the 22d of October the extraordinary resolution to wind up voluntarily was passed. The liquidators placed the shareholder's name on the list of contributories. In a question under sect. 35 of the Companies Act, 1862:

Held, affirming the decision of the court below, that it would have been improper for the directors under the circumstances to have registered the transfer on the 16th of October, and therefore that the shareholder's name was rightly included in the list of contributories.

Held, also, that it was unnecessary in this case to decide whether the contract of sale was null and void under the provisions of 30 Vict. c. 29.

APPEAL from an interlocutor of the Court of Session, refusing the prayer of a petition at the instance of the appellant, Mr. Nelson Mitchell, of Glasgow, praying for the rectification of the register of members and list of contributories of the City of Glasgow Bank. The bank was registered, but not formed under the Companies Act of 1862 (*).

In September, 1878, Mr. Nelson Mitchell was admittedly a **625] *member of the City of Glasgow Bank, as the holder of £2,500 stock ('), and his name appeared on the register of shareholders. Having resolved to sell his stock, he instructed Messrs. Black & Robson, brokers in Glasgow, to**

(') Affirming 16 Scot. L. Repr., 155; Court Sess. Cas., 4th Series, vol. 6, p. 420.

(*) The articles of copartnership are set out, *ante*, pp. 340–344.

(*) See statement as to alleged error in the admission, *post*, p. 627.

sell it. They accordingly effected the sale, the stock being sold in three lots, one lot of £1,000 on the 28th, and two lots of £1,000 and £500 on the 30th of September, all for settlement on the 16th of October. The purchasing brokers of all three lots were Messrs. A. Reid & Co., and they purchased for the bank itself on the verbal instructions of the manager, given with the directors' authority, the bank having power under the articles of copartnership to purchase its own stock. The sale of the stock was made on the Glasgow stock exchange in the usual way. The brokers, Messrs. Black & Robson, entered the sales in their note books called "transaction books," giving the date, the quantity of stock sold, the name of the stock, the settling day, the name of the purchaser's broker, and the rate of price at so much per £100. According to the practice of the stock exchange, this entry was initiated by an accredited clerk of the purchaser's brokers, Messrs. Reid & Co. In the "transaction book" of Messrs. Reid & Co. there were corresponding entries initiated by a partner of Black & Robson, the seller's brokers.

The name of the person in whose name the stock stood in the books of the bank was not mentioned to the buyer's brokers at the time of the sale; nor did the seller then know for whom the stock was purchased; nor was the stock distinguished by any number on the register of the bank. Immediately after the sale on the 28th and 30th of September, contract notes duly stamped under 41 Vict. c. 15, s. 26, intimating the purchase, were sent by Messrs. Reid & Co. to the manager of the bank; and similar notes intimating the sale were sent by Messrs. Black & Robson to the appellant. On the 2d of October the bank stopped payment, and the directors knew at the time that the insolvency of the bank was irretrievable. On the 5th the directors issued a circular calling the shareholders to an extraordinary meeting to consider a resolution ⁽¹⁾ to wind up voluntarily, on the ground that the bank could not continue its business by reason of its overwhelming liabilities. On the 11th of October the directors instructed the secretary to reply to all requests for transfer that the directors did not feel warranted to prepare a register and transfers of the bank stock. On the 15th of October advice of counsel was taken, and they concurred in thinking that the directors were not warranted to register any stock, or to take up any stock which brokers may have bought for the bank.

On the 10th or 11th of October the name of the seller of the stock was mentioned to the purchaser's brokers, and on

(1) Companies Act, 1862, sub-sect. 3 of sect. 129.

the latter date the purchaser's broker, Messrs. Reid & Co., wrote as follows to the seller's brokers, disclosing for the first time the name of the purchaser :

"Dear Sirs,—What we did in City of Glasgow Bank stock with you was on the instructions and for behoof of the bank itself. (2.) We hold no written authority. (3.) Our instructions were given verbally by R. S. Stronach, the manager. (4.) We intimated what was done by contract note to Mr. Stronach in the usual form. We requested the directors verbally on the 8th inst., and again by letter yesterday, to be furnished with the means to take up the stock for the bank as early as possible, and we have received a verbal communication from the secretary this day, 'that the board of directors have got an opinion that they cannot interfere.' We think it right to communicate this information to you at the earliest moment for your guidance."

On the 15th of October Messrs. Black & Robson wrote to the manager requesting him to prepare transfers of the appellant's stock and inclosed the stock certificates. On the same day the secretary replied, stating that in the present state of the bank affairs, the directors did not feel warranted to prepare or register any of the bank stock.

The directors' weekly meetings were on Thursdays, and the 17th October was a Thursday, the transfer therefore might have been issued on the 18th or a day or two afterwards if the bank officials had exercised unusual despatch.

On the 16th of October the appellant executed a unilateral deed of transfer of the stock in favor of the bank; and having first tendered it to the purchaser's brokers, it was subsequently, on the 18th of October, tendered to the bank for registration by a notary public and delivered into the hands of the manager.

On the 19th of October the appellant presented a petition [627] to *the court for the rectification of the register of members, by the deletion of his name therefrom, and by entering the City of Glasgow Bank as proprietor of the £2,500 stock.

On the 22d the shareholders resolved on a voluntary winding-up, and the liquidators placing the appellant's name on the list of contributories, he obtained leave to add to his petition that the list of contributories might also be rectified by deleting therefrom his name.

The liquidators lodged answers, and a minute of admissions was agreed on by the parties which contained, *inter alia*, the above facts. The respondents contended, first,

that there was no valid or effectual contract for the sale of the stock, the provision of Leeman's Act (30 Vict. c. 29) not being complied with; secondly, that, having regard to the facts of the stoppage and insolvency of the bank, the officials of the bank were neither bound nor entitled to alter the register of members as required by the appellant; and that, therefore, there was no default or unnecessary delay on their part, so as to bring the case within the 35th section of the Companies Act, 1862.

The First Division of the Court of Session on the 21st of December, 1878, decided both the above points in favor of the respondents⁽¹⁾.

On appeal,

April 3. Mr. *Higgins*, Q.C., Mr. *Balfour*, and Mr. *James Bryce*, for the appellant, contended; the first question was whether there was here a solid and effectual contract for the sale of this stock, considering the statute 30 Vict. c. 29; and the second, whether there was default on the part of the company in refusing to complete the transfer. If the second question was decided against them, then the first was immaterial as far as regards creditors, though in any question *inter socios* which might hereafter arise they might have the right to indemnify if it was held to be a proper transaction.

On the first point the words of the act which applied to the case were: "Or where there is no such register of shares or stock by distinguishing numbers, then unless such contract, agreement, or *other token shall set forth the [628 person or persons in whose name or names such shares, stock, or interest shall at the time of making such contract stand as the registered proprietor thereof in the books of such banking company."

Assuming that the act required a contract, agreement, or token to be in writing, and held void any contract for the sale of stock except it were in writing, the appellant had complied with the act, for the contract notes were part of the agreement. The respondents were not correct in saying that the advice note sent to a seller by his broker intimating the sale was not a compliance with the act, and that such note was no part of the contract. Also the contract need not be on one document; several might constitute it. And it would be a compliance with the act, if in some document the name of the holder of the shares was set forth: see Leigh's Digest of the Law of Contracts, 1878, pp. 264, 265,

(1) Court Sess. Cas., 4th Series, vol. vi, p. 420; Scot. Law Rep., vol. xvi, p. 155.

also *Gibson v. Holland* (*). It made no difference that they had not after the name of the vendor the accompanying words: "that the person so set forth is the person in whose name the stock stands." In the Stamp Act, 41 Vict. c. 15, s. 26, see also 33 & 34 Vict. c. 97, s. 69, the advice note was fixed upon as the essence of the transaction and as the most important note in the transaction, to bear the stamp duty; and the advice notes here ought therefore to be resorted to, to show what the real transaction was.

Then, alternatively, if the act did not require every contract to be in writing, according to the law of England and Scotland a valid contract might be effected for the sale of stock or shares in a bank without writing: *Humble v. Mitchell* (*); *Duncuft v. Albrecht* (*); *Bowlby v. Bell* (*). The verbal contract was made here the moment the broker called out on exchange that he accepted the stock of the selling broker.

The act did not apply to this particular case; and ought not to be strained to make null and void a *bona fide* transaction, which the Legislature had never contemplated.

On the second point there was nothing in the stoppage to prevent the mere ministerial act required of the directors in registering the transfer.

629] *The commencement of the winding-up was the event which fixed the register, and when a company had accepted a surrender—as this was in terms—perfectly *bona fide*, if the transaction was not completed before the winding-up, the seller, or the person who surrendered, could not be liable. The creditors could not object to the removal of the appellant's name, for he would be still liable as a past member. And the contributories could not complain, as it was simply carrying out a contract which the directors had entered into in exercise of their powers. There was nothing which could prevent the appellant from enforcing his contract with his *socii*, supposing the creditor's rights not prejudiced, as they were not.

[They also commented on their printed papers: *Stair's Instit.*, 4, 43, 4; *Erskine*, 4, 2, 20; *Bell's Prin.*, ss. 89, 1338; *Alison v. Fraser* (*); *Allan v. Gilchrist* (*); *Forbes v. Caird* (*); *Dickson on Evidence*, vol. i, sects. 555–557; *Nation's Case* (*); *Shepherd's Case* (*).]

(*) Law Rep., 1 C. P., 1, p. 5.

(*) 11 Ad. & Ell., 205.

(*) 12 Sim., 189.

(*) 8 Scott, C. B., 284.

(*) 1868; Court Sess. Cas., 3d Series, vol. vii, p. 39.

(*) 1875; Court Sess. Cas., 4th Series, vol. ii, p. 587.

(*) 1877; Court Sess. Cas., 4th Series, vol. iv, p. 1141.

(*) Law Rep., 3 Eq., 77.

(*) Law Rep., 2 Eq., 564, and 2 Ch., 16.

The Lords reserved judgment without calling upon Mr. *Kay*, Q.C., Mr. *Benjamin*, Q.C., Mr. *Davey*, Q.C., and Mr. *Kinnear*, who appeared for the respondents.

The appellant subsequently presented further petitions to the House, praying to be heard further by counsel as to, *inter alia*, a fact which had come to his knowledge after the argument.

On the 20th of May, Mr. *Higgins*, Q.C., by the indulgence of the House, was further heard; and stated that the admissions between the parties were erroneous in stating that the whole sum of £2,500 was registered in the appellant's name on the 2d of October, whereas the transfers to the appellant of £500, part of the said sum, were not registered or recorded till some days after the 2d of October, the date of the stoppage.

Counsel for the respondents agreeing to the proposed order, were not called upon to address the House.

*EARL CAIRNS, L.C.: My Lords, the appellant in [630 this case sold on the Glasgow Stock Exchange certain stock belonging to him in the City of Glasgow Bank. The sales were made on the 28th and 30th of September, 1878, the settling-day being the 16th of October. The brokers who bought, bought for the bank, and there is no doubt that the bank, who had authority to buy their own stock under their deed, were the purchasers. Before the settling-day came, the bank, as your Lordships know, stopped payment. On the 16th of October a deed of transfer of the stock was tendered by the appellant to the bank, of course without any expectation of receiving from the bank the purchase-money for the stock; the bank refused to accept or register the transfer, and the name of the appellant was put on the list of contributories.

Two questions were raised in the appeal, first, whether there was a valid contract for the sale of the stock having regard to the provisions of 30 Vict. c. 29; and, secondly, was the company in default for not accepting and registering the transfer? The Court of Session has decided both points against the appellant.

My Lords, on the first point, viz., the effect of 30 Vict. c. 29, I have not been satisfied by the arguments of the appellant, either during the first argument or during the further argument which has taken place to-day (20th May), that the decision of the Court of Session was erroneous; but it appears to me unnecessary to decide that question, because I have no doubt that on the second point this case is not materially distinguishable from those already decided by

your Lordships, and that, for the same reasons which were given in them, it would have been improper for the bank to have accepted or registered the transfer on the 16th of October, and therefore that the name of the appellant rightly remains upon the register and was rightly included on the list of contributories. I propose to move in this case that the appeal be dismissed with costs.

With regard to the suggestion now made that the admissions entered into between the parties are erroneous in stating that the whole sum of £2,500 stock was registered in the appellant's name on the 2d of October, whereas the transfers to the appellant of £500 part of the said sum were not 631] registered or recorded until *some days after the 2d of October, I express no opinion whatever as to what ought to be the consequence of that fact, if it be a fact; but your Lordships may perhaps be disposed to say that the dismissal of this appeal should not prejudice any application which the appellant may make to the Court of Session on this score.

LORD HATHERLEY, LORD O'HAGAN, LORD SELBORN, LORD BLACKBURN, and LORD GORDON, concurred.

Judgment:—Ordered and adjudged, that the said interlocutor of the Lords of Session in Scotland, of the first division, of the 21st of December, 1878, complained of in the said appeal, be, and the same is hereby affirmed, and that the said petition and appeal be, and the same is hereby dismissed this House, but without prejudice to any application which the appellant may be advised to make to the Court of Session to reduce the amount of stock (£2,500) in respect of which his name has been placed on the list of contributories on the ground now alleged in his petition to this House, presented on the 19th day of May instant, namely, that the transfers to the appellant of £500 part of the said amount were not, on the 2d of October, 1878, nor until some days afterwards, registered or recorded in the books of the company: *And it is further ordered*, that the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal.

Lords' Journals, May 20, 1879.

Agents for appellant: *Grahames, Wardlaw & Currey.*

Agents for respondents: *Martin & Leslie.*

[4 Appeal Cases, 632.]

[HOUSE OF LORDS.]

H.L. (Sc), July 1, 1879.

***GILLESPIE and PATERSON, Appellants; CITY OF GLASGOW BANK AND LIQUIDATORS, Respondents** (1).

Company—Winding-up—Stock in the Names of Partners for themselves “and the Survivor for behoof of the Firm”—Trustees—Joint and several Liability.

For some years previous to 1878 A. and B. had carried on in partnership the business of law agents in Edinburgh. By contract of copartnership, executed in August and October, 1878, A. and B. on the narrative that the former partnership had ceased, agreed to continue the same, and to assume C. as a partner on the terms, *inter alia*, that the new firm should continue under the firm name of A. and B.; that the bank account should be kept in the name of the firm; and that A. and B. should supply the necessary capital required in equal proportions, either by holding bank stock in the name of the firm, or by advancing the requisite funds. Prior to the execution of this contract, but with a view to the arrangements of the new firm, £1,000 of stock of the City of Glasgow Bank, an unlimited joint stock company, was purchased by A. and B. who supplied the price in equal proportions. A transfer was taken in favor of A. & B., “and the survivor of them for behoof of the firm” of A. & B. A similar entry appeared in the register of members.

C. was not aware of the terms of the contract, or a party to the transfer. The bank stopped payment, and the liquidators placed A. & B. individually on the list of contributories as holders of £1,000 of stock as “trustee for the firm” of A. & B. In an application *inter alia* to vary the list by deleting the words “trustee for the firm” and to place A. & B. on the list as contributories each for a separate sum of £500:

Held, affirming the decision of the court below, that a trust was created for the benefit of the partnership, and that as trustees A. and B. were jointly and severally liable for all calls in respect of the £1,000 of stock.

APPEAL against a portion of an interlocutor of the first division of the Court of Session.

The only question involved in the appeal was whether the appellants, John Gillespie and Thomas Paterson, writers to the signet in Edinburgh, were rightly entered in the list of contributories of the City of Glasgow Bank as joint holders of £1,000 of stock standing in their names; or whether they were entitled to be entered as contributories each for a separate sum of £500.

*In winding up the bank, the liquidators found, [633 under date of the 12th of August, 1878, the following entry in the stock ledger and in the transfer register:—“John Gillespie and Thomas Paterson, and the survivor of them, for behoof of the firm of Gillespie & Paterson, W.S.,” and the stock was entered, “By stock purchased from Alex. Tod,

(1) Affirming 16 Scot. L. Repr., 473.

£1,000" ('). The liquidators thereupon made the following entries in the list of contributories :

No. on list.	Name.	Address.	Description.	In what character included.	Extent of interest.
1429	Gillespie & Paterson.	Writers to the Signet, Edinburgh.	The trustees for.	Holders of stock.	£1000.

No. on list.	Name.	Address.	Description.	In what character included.	Extent of interest.
1481	John Gillespie.	Edinburgh.	W. S., trustee for Gillespie & Paterson.	Holders of stock.	£1000.

No. on list.	Name.	Address.	Description.	In what character included.	Extent of interest.
1603	Paterson Thomas.	Edinburgh.	Trustee for Gillespie & Paterson.	Holders of stock.	£1000.

The liquidators subsequently called upon the firm of Gillespie & Paterson and the appellants each to make payment of a first call of £500 payable in respect of the £1,000 stock.

A petition was then presented by Gillespie & Paterson, writers to the signet, Edinburgh, and by the appellants, and John Hamilton Gillespie, the individual partners of the said firm of Gillespie & Paterson, and by the appellants as individuals, praying the Court of Session to order the 634] liquidators of the bank *to delete from the list of contributories the firm name of the petitioners, Gillespie & Paterson; and further, to delete from the said list the words "trustee for Gillespie & Paterson" in the description of the petitioners, John Gillespie and Thomas Paterson respectively; and further, to delete from the said list the sum of £1,000, as the interest of John Gillespie and Thomas Paterson respectively, in the stock of the company, and to sub-

(') For wording of transfer, see *post*, p. 637.

stitute the sum of £500 therefor. To this petition the liquidators lodged answers, and the following minute of admissions was agreed to by the parties :

(1.) That for eight years, ending on the 31st of July, 1878, the petitioners, John Gillespie and Thomas Paterson, carried on the business of law agents and conveyancers in Edinburgh as partners, under the firm of Gillespie & Paterson.

(2.) That during the subsistence of the said partnership the bank account of the firm with the City of Glasgow Bank was kept in the name of the petitioner, John Gillespie, who was individually a shareholder of the bank to a considerable amount.

(3.) That by contract of copartnery executed by the petitioners, John Gillespie and Thomas Paterson, on the 14th of August, 1878, and by the petitioner, John Hamilton Gillespie, on the 1st of October, 1878, the said John Gillespie and Thomas Paterson, on the narrative that the former partnership had come to an end as at the 31st of July, 1878, agreed to continue the same, and to assume the said John Hamilton Gillespie as a partner, on the terms, *inter alia*, that the copartnership should be continued under the firm of Gillespie & Paterson; that the bank account should be kept in the name of the firm; that the said John Gillespie and Thomas Paterson should supply the necessary capital in equal proportions, either by holding bank stock in the name of the firm, or by advancing the requisite funds; and that the said John Hamilton Gillespie should receive a certain percentage of the clear profits of the business, the remainder being divided equally between the said John Gillespie and Thomas Paterson.

(4.) That prior to the execution of the said contract of copartnership, but with a view to the arrangements of the new firm, the £1,000 stock in question was purchased by the said John Gillespie and Thomas Paterson, and the transfer taken in favor of themselves and the survivor for behoof of the firm. The said transfer is dated the 13th and 29th of July, 1878.

(5.) That the purchase price of the said stock (amounting to £2,395 without stamp and transfer fee) was paid on the 26th of July, 1878, and was contributed in equal proportions by the said John Gillespie and Thomas Paterson; and the only dividend ever paid thereon (being the sum of £60 paid on the 1st of August, 1878) was carried to their credit in the books of the firm in the proportion of one half to Mr. Gillespie and one half to Mr. Paterson.

(6.) That the petitioner, John Hamilton Gillespie, was not a party to and gave no authority for the purchase of the said stock, and was not aware of the terms of the transfer, or that the stock had been bought for behoof of the firm, until after the stopping of the bank.

635] *The Court of Session, on the 27th of February, 1879, directed the liquidators to remove from the list of contributories of the bank the name of the partnership firm of Gillespie & Paterson, writers to the signet, but otherwise refused the prayer of the petition, holding that the appellants must be regarded as a body of trustees, and that, as such, their liability is joint and several (').

From the latter portion of this judgment the appellants appealed.

The Lord Advocate (Rt. Hon. W. Watson), and Mr. *Chitty*, Q.C., for the appellants, contended that they were not trustees, but joint holders, as individuals, of the stock for a certain specified purpose. That special purpose was to form a fund of credit for the new firm; but that did not give the firm the rights of a beneficiary. Nor was the stock an asset of the firm. It was inconsistent with the notion of a trust, that the alleged trustees should have the power at their pleasure of actually abolishing the supposed trust altogether (by withdrawing the money from the investment) and substituting for it the relation of lender and borrower between themselves, and the beneficiaries: this the appellants were free to do. The words "for behoof of" did not necessarily import a trust, but might indicate an obligation, and that was all they were intended to do here. The appellants were each put on the list for £1,000, which was exactly the reverse of what ought to have been done. The appellants, though both liable to an unlimited extent to the creditors of the bank fell to be dealt with in contribution, as if each were holder of one half of the total £1,000 stock. Their further argument is sufficiently commented on by the Lords in their opinions.

[They relied on *Stair's Inst.* 1, 17, 20; *Erskine's Inst.* 3, 3, 74; *Erskine's Prin.* 3, 3, 29; *Bell's Prin.* ss. 51, 52; *Bell's Com.* (seventh ed.), vol. i, pp. 361-364.]

Mr. *E. E. Kay*, Q.C., Mr. *Benjamin*, Q.C., Mr. *Davey*, Q.C., and Mr. *Asher* (of the Scotch bar), appeared for the respondents, but were not called upon to address the House.

636] *The Law Peers delivered the following opinions:

(') *Scot. Law Rep.*, vol. xvi, p. 473.

EARL CAIRNS, L.C.: My Lords, I should desire in the first place to direct your Lordships' attention to the form in which the list of contributories has been settled in the present case. In the first instance, when the liquidators settled the list of contributories, the firm of Gillespie & Paterson was entered upon that list as a firm, and as holding the sum of bank stock in question. That entry has been struck out, and there is no appeal upon that subject, therefore that is out of the question. But there remain two entries, in one of which Mr. John Gillespie is entered as the holder of £1,000 bank stock as trustee for Gillespie & Paterson, and another entry in which Mr. Thomas Paterson is entered as holding £1,000 bank stock as trustee for Gillespie & Paterson. It is not in controversy that, although there is a mention here of two sums which might at the first sight appear to be separate, they really are one and the same sum; and although perhaps in this country there would have been one entry comprising the two names, both John Gillespie and Thomas Paterson, as the holders of the sum, the same end is attained in Scotland by separate entries. There is not any controversy between the parties as to more than a sum of £1,000 bank stock being charged against the two names that I have mentioned; but the real question, the question argued upon the appeal before your Lordships, is how those two persons (the appellants) are to be charged with this sum of £1,000 bank stock. The contest of the appellants is that it is stock for which they are to be inserted as liable, each for one half, that is £500, and not as liable *in solidum*, each of them for the whole.

My Lords, that depends on the circumstances under which, and the purpose for which, this stock was acquired by these parties. The two appellants had been in partnership, and the partnership was about to be reconstructed with the addition of a third partner, who is not before your Lordships, and is stated in the admissions, "prior to the execution of the contract of copartnery, but with a view to the arrangements of the new firm, the £1,000 stock in question was purchased by" the appellants to be transferred on the day—in fact it was transferred a few days before—the new contract of copartnery was executed. Now, [637 the way in which it was purchased was this. The vendor, the transferor, was Alexander Tod, and he transferred it to Gillespie & Paterson in these words: "I, Alexander Tod, St. Mary's Mount, Peebles, in consideration of the sum of £2,395 sterling, now paid to me by John Gillespie and Thomas Paterson, both writers to the signet in Edinburgh,

do hereby sell, assign, transfer, and make over to and in favor of the said John Gillespie and Thomas Paterson, and the survivor of them, for behoof of the firm of Gillespie & Paterson, writers to the signet, Edinburgh, £1,000 sterling of the consolidated capital stock of the City of Glasgow Bank Company," and so on. It is not disputed that "the firm of Gillespie & Paterson" mentioned here means not the old firm in which Mr. Gillespie and Mr. Paterson alone were partners, but the new firm in which Mr. Gillespie and Mr. Paterson were partners with a third party. The transfer, therefore, is to the two, Gillespie and Paterson, "and the survivor of them, for behoof of the firm of Gillespie & Paterson."

Now, what is the meaning of those words, "for behoof of the firm of Gillespie & Paterson"? As I understand the condition of the argument on the part of the appellants, it is this—if those words, "for behoof of the firm of Gillespie & Paterson," constitute a trust as we term it, that is to say, make the holders of the stock to hold it in trust for the firm, then it is admitted by the appellants that there is no doubt that they hold it upon that joint account, and that they are properly inserted as liable *in solido* to be charged, each of them, with the whole of the £1,000. If, on the other hand, there is no trust—if the property remains the property of Gillespie & Paterson without any trust—then the appellants raise an argument as to the Scotch rule where property is held *pro indiviso*, or where an obligation is undertaken *pro indiviso*, and it would be necessary to consider how that rule of Scotch law should be applied.

The first question is, was there, or was there not, a trust created by these words? In order to determine that it would be necessary to look to the purpose for which this stock was bought, and the arrangement under which it was to be held. That, my Lords, is to be found in the contract of copartnership which was executed a few days afterwards, but which must [638] be taken to be part and *parcel of the same transaction. The two partners, Gillespie and Paterson, agree to continue partners, "and to assume the said John Hamilton Gillespie as a partner, on the terms, *inter alia*, that the copartnership should be continued under the firm of Gillespie & Paterson; that the bank account should be kept in name of the firm" (I may say it is admitted that the old firm had banked with the City of Glasgow Bank, and that the word "bank" here refers to the City of Glasgow Bank); "that the said John Gillespie and Thomas Paterson should supply the necessary capital in equal proportions, either by holding

bank stock in name of the firm, or by advancing the requisite funds; and that the said John Hamilton Gillespie should receive a certain percentage of the clear profits of the business, the remainder being divided equally between the said John Gillespie and Thomas Paterson."

That, my Lords, exhausts the whole of the materials upon which your Lordships have to come to your decision as to the meaning of the words "for behoof of the firm," and the object for which those words were used. In the first place I must ask your Lordships to consider this question; suppose there was not an intention here of creating a trust for the firm, has any explanation whatever been given, has any plausible suggestion been made at the bar, of the purpose for which it is stated that these two persons held the bank stock? They were to hold it so that it was to go to the survivor of them. If they were not holding it for the purpose of a trust, the only other way in which they could be holding it would be for themselves as individuals. If they held it for themselves as individuals, it is contended by the appellants that they were interested equally, each to the extent of one half of the property. But if that were so, for what possible reason could it be suggested that there should be a destination of this property, in which on that hypothesis they were equally interested, so that it would go on to the death of one, not as to one half to his representatives and as to the other half to the survivor, but the whole to the survivor? My Lords, I am bound to say that there was not any suggestion made which appeared to me to have even a semblance of plausibility for such an arrangement. On the other hand if there was a trust, of course it would be most natural to provide that the two persons who were holding the stock for the *purpose of implementing and satisfying the trust, should hold it so that it would go to the survivor.

Now, my Lords, let us look at what the substance of the case was. The substance of the case was this: that there should be provided in one of two ways what we call capital, that is to say, available assets for the firm. This was to be done either by way of a supply of money or by a supply of proprietorship in stock of the bank at which the partnership banked, and which bank therefore would give facilities, no doubt, in credit for the purpose of the partnership. But an arrangement of the latter kind, in order to make it a practical and useful and real arrangement, must in some way or other give the partnership which was to be benefited some control over and some interest in that which was to be pro-

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vided as the capital of the partnership, namely, the bank stock. It was not necessary that the partnership should be out and out the proprietors of the bank stock so that no other person should have any interest therein; but it was necessary that for the purpose of a partnership contract the partnership should have the first claim to have the purposes of a partnership contract satisfied with reference to that bank stock. It may well be that the two persons who bought the bank stock might at any time have come to the partnership and said, "We wish to use this bank stock for another purpose; we wish now to advance the requisite funds in money for the purpose of capital; here are the funds in money which are necessary for the capital, and we claim to take away the bank stock and dispose of it as we think proper." It might well be that when a dividend was declared upon the bank stock, the two holders of the stock might say to the partnership, "The bank stock is supplied for the purposes of the partnership, but we do not mean the partnership to have the dividends," and it might be that the partners would agree to that. It may be that they did agree to that; it was a matter for the partners to arrange amongst themselves. But after and apart from all subsidiary arrangements of that kind, there remains the substantial arrangement, which was, that the holding of the bank stock was to be either in the name of the firm or for behoof of the firm, which would be equivalent to that proprietorship and that interest in the stock which there would be if the stock stood in the name of the firm.

640] *My Lords, there is no magic, as was admitted at the bar, in the use of the word "trust." There may be half-a-dozen words in the English language which would bring about the same result as the use of the word "trust," and it appears to me that words which say that one person holds property "on behalf of" or "for behoof of" another, are words which come up to and satisfy the idea of the word "trust," just as much as the word "trust" itself, if the circumstances of the case are consistent with that interpretation. Now here, my Lords, the circumstances of the case not only appear to me to be consistent with that interpretation, but to be absolutely inconsistent with any other interpretation. That being so, it appears to me that it is unnecessary to enter upon an examination of those authorities upon Scotch law as to an obligation *pro indiviso* or property held *pro indiviso*. I, therefore, upon the ground that it appears to me that there was here a trust created for the benefit of the partnership, move your Lordships to affirm

the judgment of the court below and to dismiss the appeal with costs.

LORD HATHERLEY: My Lords, I am of the same opinion.

We might in this case have had to inquire into the question as to what the exact effect of the first words used with reference to the interest of the appellants is, whether or not the directing that the stock should go to the survivor of Gillespie and Paterson creates that sort of interest which was described by the Lord Advocate as an interest *pro indiviso*, and gives such a character of severance as would be similar to tenancy in common in this country, and would make each of the proprietors in the present case the proprietors of £500 instead of the two together being liable *in solido* for the £1,000. If the matter stood there alone, and we had simply the words saying that the stock was transferred to and held by Gillespie and Paterson and the survivor of them, we should be obliged to come to a conclusion upon that portion of the case after considering the authority which has been cited from Erskine's Institutes and elsewhere. But the words afterwards superadded, namely, "for behoof of the firm of Gillespie and Paterson," must, I apprehend, have made everybody perfectly aware of what the real nature of the transaction was.

*It was decided in *Muir's Case* (') that it is no part [64] of the duty of a creditor of a bank to ascertain what the exact nature of the trust may be on which some shareholders hold stock of the bank. He is told that certain parties hold a fund in trust, and we have now decided in *Muir's Case* ('), and in several cases which have followed it, that the entry that the property is held in trust amounts to a statement by the holder of it, "I am a shareholder;" it affirms the position of the trustee as a shareholder, but, for some purpose or other, connected more probably with the interest of the *cestui que trust* than of the creditors, it is thought fit to state upon the register that, although the shares which the shareholder in question holds are held by him absolutely, he does not hold them beneficially but for the benefit of somebody else, that being a matter with which the creditor has nothing to do. That was the principle laid down in *Muri's Case* ('). Therefore here the case is reduced simply to this point, whether or not the words "for behoof of" a given person or persons are equivalent to "in trust for." I have heard nothing that to my mind gives an intelligent explanation of the words which are here used, unless they are equivalent to "in trust for."

(') *Ante*, p. 286.

The difference between saying, This is a fund I put by in order to be ready at all times to fulfil an obligation I have entered into with certain persons, for whose behoof I have taken it, on the one hand, and an absolute direct trust on the other, is too shadowy for my mind. I take it that a person who has entered into such an engagement could not relieve himself of that engagement unless he preferred to adopt the other alternative provided for in the deed, namely, to find the money in some other way; in which case he would not have described this fund as held "for behoof of" the other parties. So long as it is held for their behoof it is held by the shareholder as the absolute owner of it as regards the creditors of the City of Glasgow Bank. As far as regards persons outside the *cestui que trust* it is held for his behoof. Whether you say you hold "for behoof of" some one, or you hold "on behalf of" some one, or you hold "in trust for" some one, there is no particular magic in the choice of words; all those words indicate that you are [642] not beneficially the owner. You in effect *tell the creditors of the concern, As between you and me, I am the holder of the stock, but as between me and a third person with whom you have nothing to do, I am the holder of it for that person's benefit.

I apprehend, therefore, that this case cannot be distinguished from those which have already come before us (*). I cannot perceive a difference between the words "for behoof of" and "in trust for." I hold the expression "for behoof of" to mean exactly the same as if the words used had been "on behalf of" or "for the benefit of," or any of those other words, of which many might be suggested, which indicate that although to the bank you are the absolute owner of the shares, yet as regards a third person, with whom you have entered into an arrangement, you are not that owner; but that makes no difference as regards your position to the bank and to its creditors.

LORD O'HAGAN: My Lords, this case appears to me, upon the whole, reasonably clear. I am very glad that the decision to which your Lordships are coming does not necessitate any difference from the court below with respect to what appears to be the very peculiar condition of Scotch law contrasted with the law of this country—as to which, of course, we should defer very largely to the learned judges in Scotland.

I may observe, with reference especially to the judgment of Lord Shand, that it appears to me that we have here to

(*) *Ante*, p. 386.

deal simply with the entry in the stock ledger and with the meaning of that entry ('). We have nothing to do with a large inquiry as to the constitution of the company, or with the relative rights of the *members of it. Upon the [643 stock ledger a particular statement is made, and by that statement all parties are bound to stand whether they be shareholders or creditors of the company. That is the statement which instructs them with reference to the rights they may properly assume to exist, and, confining ourselves to that, it appears to me that there is no ground for doubting that if that statement had been read in the ordinary way by persons having access to the stock ledger, the conclusion we are invited by the noble and learned Lord on the woolsack to come to-day, would be the one at which reasonable people would arrive.

Now, my Lords, looking at the words before us, we have, first of all, a plain right of survivorship, and if it were not a Scotch case, the matter would be tolerably clear. Then we come to the words by which it is said that a trust is established (and these words exist equally in the stock ledger) "for behoof of" the firm. I cannot add anything to what has already been said as to these. They seem to me substantially equivalent to the words "in trust for" the firm. The Lord Advocate was very forcible and ingenious in pointing out that it was consistent with the terms used that the property might be in Mr. John Gillespie and Mr. Thomas Paterson merely while they were using the name of the firm; and no doubt that was a view of the case which required consideration. But, upon the whole, looking at

(1) Lord Shand said: Even if the transfer and relative entry in the stock-ledger had been in favor of Mr. Gillespie and of Mr. Paterson without any words of survivorship, or reference to the trust, I have not heard any argument that would satisfy me that this would infer anything short of joint and several liability for the whole stock, or lead to any conclusion except that these gentlemen held the stock as joint owners with the ordinary liabilities of partners for the whole. But it is not necessary to decide that question; for on the face of the register, in conformity with the terms of the transfer, the stock was taken to these gentlemen and the survivor of them in the first place, and for behoof of the firm of Gillespie & Paterson in the next. These two elements, — the clause of

survivorship and the expression that the stock was held for behoof of the firm of Gillespie & Paterson, are plainly sufficient to show that this was a case of joint ownership; and I do not think that in a case where you have that expressly stated on the face of the transfer and in the register, it is competent to contradict that statement either by parol evidence or by the effect of admissions such as we have in this joint minute. The creditors of the company and partners of the company are entitled to take the register as that which embodies their contract, and I do not think you can explain away the effect of the entry in the register by any evidence that that entry is in point of fact incorrect, and that the persons who professed to act as trustees were really not so.

the matter broadly and according to the effect of common language, I think any one would reasonably, as my noble and learned friend has said, identify the expression "for behoof of" with the expression "in trust for."

This consideration ought perhaps to be added. It is urged that the establishment of a trust would put an end to the [644] question as to the survivorship and the personal rights of the parties, because a trust requires survivorship from its very nature. In the case before us, when we look at the contract, and we see that the members of the old company were to supply capital from time to time for the continuing firm, it becomes evident that the reason of the rule with reference to a trust will apply to this particular case. The exigency of the circumstances would not be satisfied unless we held that in this particular case there was a trust, or something at all events necessarily involving survivorship and not merely a *pro indiviso* interest, as it was described by the Lord Advocate.

We have, I repeat, only to consider the terms of the entry in the stock ledger; and taking those terms together I think that they give a right of survivorship and establish a trust.

LORD SELBORNE: My Lords, I am entirely of the same opinion. It appears to me that the judgments of the learned judges of the Court of Session are altogether satisfactory.

If your Lordships were called upon in this case to enter into the first and principal argument of the learned counsel for the appellants, I apprehend that it would be necessary for your Lordships to consider the doctrine which was cited from the institutional writers of Scotland as to the cases in which contracts and interests in property are, as we should say in England, held in common rather than jointly, *pro indiviso* being the Scotch phrase which is equivalent to our phrase "in common; and we should not only have to consider the doctrine laid down by those institutional writers generally, but we should have to consider it in connection with the particular clauses of this copartnership deed of the City of Glasgow Bank; and it would be necessary to determine in that case whether or no the application of the doctrine, where two persons are registered as proprietors of shares, would be consistent with the deed of the bank.

But your Lordships are not called upon now to enter into that inquiry. What we have to deal with here is a deed which makes the matter clear beyond controversy, and independently of that inquiry, not only by expressly providing for survivorship, which would be wholly unnecessary in the case of a *pro indiviso* interest, but also by

the statement that the shares are held "for the behoof of" the partnership, as to which I entirely agree with what has been said by your Lordships.

I also think that the Lord President was quite right in saying that, as this is a question as to the rights of partners in a bank and creditors of the bank against the persons in whose names the shares are registered, it would not be right to go outside the register and the deed of transfer for the purpose of ascertaining anything which may have passed between the parties, and which as between them might vary the effect of the deed of transfer and the register taken by themselves. That effect is, I apprehend, such that nobody could ever reasonably have regarded it as creating anything but a joint interest. As it happens, the extrinsic evidence confirms that conclusion; but for my own part I agree with the Lord President, that, if it had had an opposite tendency, it ought not to have been regarded.

LORD BLACKBURN: I am also of the same opinion.

I do not think it at all necessary or desirable to enter into the question of Scotch law as to what will make obligations, or property, *pro indiviso* when according to English notions they would not be *pro indiviso*. I do not think it necessary to inquire whether if two men were entered on the register as proprietors of the stock in question without anything more, it would be *pro indiviso* or not. I observe that Lord Shand gives it as his opinion that it would not⁽¹⁾. I do not pretend to have entered enough into the matter to say how that would be. But this I think appears clear upon the authorities which have been referred to, that although an obligation may *prima facie* be *pro indiviso*, yet very slight circumstances in the nature of the contract, or an express agreement that it should not be *pro indiviso* but jointly, may prevent its being *pro indiviso*. And as to that, if I understand rightly, the books that were referred to⁽²⁾, one of the things that have been determined to be sufficient to show that it is not *pro indiviso*, but *is joint and sev- [646
eral, is if they have expressly said, "We two mean to enter into this obligation conjunctly." I confess I should have been very much inclined to think, although it is not necessary to decide it, that when they say, "We or the survivor of us enter into it," it would be much the same as if they had said, "We enter into it conjunctly." However, it is not necessary to decide that. There is another thing which is borne out by all the Scotch authorities, namely, if the two

⁽¹⁾ *Auld*, p. 420.

⁽²⁾ *Erskine's Inst.*, 3, 3, 74; *Erskine's Prin.*, 3, 3, 29; *Bell's Prin.*, ss. 51, 52.

take a fund or an estate with a fiduciary obligation to manage it for somebody else, the nature of the case requires that it should be jointly. They cannot take it *pro indiviso*, each having a portion of it, and yet manage the whole as one body for the benefit of those who are beneficially interested. Consequently, when it appears that it is taken in trust for somebody else, or that they stand in a fiduciary relation in respect of it to somebody else, that is quite enough, by itself alone, to show that they must have taken it conjointly so as to be jointly and severally parties entering into the obligation; in which case all the rest would follow as self-evident.

Now, in the present case, it appeared upon the face of the register, and of the transfer too for that matter, that the shares were taken by John Gillespie and Thomas Paterson and the survivor of them "for behoof of the firm of Gillespie & Paterson." It strikes me that the survivorship alone would make a very strong ground indeed for saying that they took it jointly and severally and not *pro indiviso*; but when it comes to be added that they take it "for behoof of the firm of Gillespie & Paterson," I think that at once shows on the face of the matter that as they professed to do something (I need not inquire how much or how little they would actually do) for behoof of the firm of Gillespie & Paterson; they undertook it for the purpose of doing something for them which they could not have done if they took it *pro indiviso*. Therefore it appears to me that they sufficiently expressed their intention not to take it *pro indiviso*, but to take it jointly and severally. That is quite enough to show that the decision of the court below is right, and ought to be affirmed.

I may add that I agree with the view which I think is expressed more strongly by Lord Shand⁽¹⁾, but which is also [647] expressed by the *Lord President, that inasmuch as the appellants put this upon the register to be seen by the creditors of the bank it does not matter whether they really were holding the stock for the benefit of the firm or not. It is quite enough that they said to the creditors and all persons who would see it, "We are holding this 'for behoof of'" (which I think can have no other sense than partially, at all events, in trust for) "the firm of Gillespie & Paterson." Their saying that was enough to show that they intended to hold it not *pro indiviso* but jointly and severally, and, having done so, it would not have availed them if they could have shown that they were not in fact holding it for the benefit of Gillespie & Paterson. But when you look at the

(¹) *Ante*, p. 420.

facts I agree with the Lord President that what is stated upon the register is clearly made out and strictly accurate; that they were holding it in trust for the firm.

LORD GORDON concurred.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Lords' Journal, 1st July, 1879.

Agent for appellants: *W. A. Loch.*

Agents for respondents: *Martin & Leslie.*

[4 Appeal Cases, 648.]

H.L. (Sc.), June 20, 1879.

[HOUSE OF LORDS.]

*CREE, Liquidator of the BONNINGTON SUGAR [648
REFINING COMPANY, *Appellant*; and SOMERVAIL and
Others (THOMSON'S TRUSTEES), *Respondents* (').

*Company—Winding-up—Purchase by Company of its own Shares in the Names
of Trustees—Trustees liable—Companies Act, 1862, ss. 35, 38, 39.*

One of the articles of association of a Scotch joint stock limited company enacted that "No transfer of any shares of the company's stock, either upon a sale, or in consequence of the bankruptcy or insolvency of any shareholder, or in consequence of the marriage of any female shareholder, shall be valid or effectual without the consent of a majority of the other shareholders expressed in writing; but in the event of the other shareholders declining to consent to any such proposed transfer of shares in the company, they shall be bound to take such shares at the price offered in the case of a proposed sale, and at the market price of the day in the case of a proposed transfer for any other cause." Added subsequently by special resolution: "Unless such shares shall not at the time be fully paid up, and the reason for declining to consent be that the directors are not satisfied with the proposed transferee."

Trustees entered upon the register were anxious in the discharge of their duty to dispose of their trust shares, which consisted of 100 £100 shares, fifty being fully paid up, and fifty on which £1 per share had been paid. After negotiations, the four directors by special minute approved of the purchase by three of themselves of these shares to be held in trust for the company. A transfer was executed in favor of the three directors "in trust for the company;" and their names were entered upon the register of members, with the same designation. The money paid for the shares came out of the funds of the company; and thereafter the selling trustees ceased to be treated as having any interest therein. At the next general meeting the purchase was approved of by a majority of the shareholders. There was no other transfer or transferees proposed. More than fifteen months after the transaction the company was wound up voluntarily, and calls were necessary to pay creditors. In an application by the liquidator substantially for rectification of the register, by substituting the names of the selling trustees for those of the three directors; it being admitted that all parties had acted with perfect good faith:

Held, affirming the decision of the court below, that the names of the three persons—the three directors—now appearing upon the register as *holding [649 these shares could not be disturbed; the transfer to them being valid and effectual, and the rights of creditors having intervened.

(') Affirming 16 Scot. L. Repr., 33; Court Sess. Cas., vol. 6, p. 80.

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Held, also, dissenting from the opinion of the majority of the court below, that the above article of association did not give any power to the company to become the purchaser of its own shares, nor had the transaction been carried on under its provisions.

Oakes v. Turquand (Law Rep., 2 H. L., 325.) and *Muir v. City of Glasgow Bank* (*ante*, p. 337.) followed.

Per EARL CAIRNS, L.C.: The directors held out to the world that these shares were owned by individuals, and to this the individuals assented. Beyond this creditors had no occasion to look, and they would be entitled to assume that whatever amount of liability attached to the shares was assumed by the individuals in whose name they stood, and that this liability was not in any way diminished by reference to the trust on which they were held.

APPEAL from the Second Division of the Court of Session. The interlocutor appealed against was made on a petition by the appellant as liquidator in the voluntary winding-up of the Bonnington Sugar Refining Company, Limited, praying that the respondents' names should be put upon the list of contributories. The Lords of Session refused the prayer of the petition with expenses.

The only question raised and brought before the House was whether that prayer should have been granted. The facts material for the decision of that one question were not in dispute. The Bonnington Sugar Refining Company, Limited, was formed in 1864 under the provisions of the Companies Act, 1862. The memorandum of association was as follows:

1. The name of the company is The Bonnington Sugar Refining Company, Limited. 2. The registered office of the company is to be established in Scotland. 3. The object for which the company is established is "the buying and selling of sugar, and carrying on the business of sugar refining, and all processes connected therewith." 4. The liability of the shareholders is "limited." 5. The nominal capital of the company is £50,000, divided into 500 shares of £100 each.

The 12th article of association was as follows:

No transfer of any shares of the company's stock, either upon a sale, or in consequence of the bankruptcy or insolvency of any shareholder, or in consequence of the marriage of any female shareholder, shall be valid or effectual without the consent of a majority of the other shareholders expressed in writing; but in the event of the other shareholders declining to consent to any such proposed transfer of shares in the company, they shall be bound to take such shares at the price offered in the case of a proposed sale, and at the market price of the day in the case of a proposed transfer for any other cause.

By special resolution, confirmed 24th of March, 1873,

the following words were added to the said 12th article: "Unless such shares shall not at the time be *fully [650 paid up, and the reason for declining to consent be that the directors are not satisfied with the proposed transferee" (').

The original 500 shares of £100 each were fully paid up. By special resolution passed on the 24th of February, and confirmed 24th of March, 1873, it was agreed to increase the

(1) Other articles of the copartnership cited in the arguments of counsel, were as follows:

"(16.) If the requisitions of any such notice (for payment of calls) are not complied with, any share in respect of which such notice has been given may at any time thereafter, before payment of all calls, interest, and expenses due in respect thereof has been made, be forfeited, by a resolution of the directors to that effect.

"(17.) Any shares so forfeited shall be deemed to be the property of the company, and may be disposed of in such manner as the company, in general meeting, thinks fit.

"(18.) Any member whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing upon such shares at the time of the forfeiture.

"(19.) A statutory declaration in writing, that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated, as against all persons entitled to such share; and such declaration and the receipt of the company for the price of such share shall constitute a good title to such share; and a certificate of proprietorship shall be delivered to a purchaser, and thereupon he shall be deemed the holder of such share, discharged from all calls due prior to such purchase, and he shall not be bound to see to the application of the purchase-money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such forfeiture and sale.

"(20.) The directors may, with the sanction of the company previously given in general meeting, convert any paid up shares into stock.

"(22.) The several holders of stock

shall be entitled to participate in the dividends and profits of the company according to the amount of their respective interests in such stock; and such interests shall, in proportion to the amount thereof, confer on the holders thereof respectively the same privileges and advantages for the purpose of voting at meetings of the company, and for other purposes, as would have been conferred by shares of equal amount in the capital of the company.

"(23.) The directors may, with the sanction of a special resolution of the company previously given in general meeting, increase its capital by the issue of new shares.

"(24.) Subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them, . . . and if any member entitled declines to accept such shares, the directors may dispose of the same in such manner as they think most beneficial to the company.

"(25.) Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions with reference to the payment of calls, and the forfeiture of shares on non-payment of calls, or otherwise, as if it had been part of the original capital.

"(32.) Seven days' notice at the least, specifying the place, the day, and the hour of meeting, and in case of special business, the general nature of such business, shall be given to the members in manner hereafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting. Any resolution to be

651] capital of the *company by £50,000, divided into 500 shares of £100 each, to be offered to the then members in proportion to the number of shares held by them respectively. On the new shares thus issued £1 only was paid up; and each of the then members accepted one new share for each original share held by him, and was so entered on the register.

The company appears to have been a *bona fide* commercial company. The shares were in very few hands, and seem never to have been dealt with speculatively. And during the whole history of the company, for fourteen years, there were only nineteen transfers of shares upon sale. The original shareholders were closely connected with each other—as relatives or private friends; and the new shareholders who were admitted to the company were similarly connected with the original partners. In 1875 the whole shares, as appears by the register, were held by eighteen shareholders; one was James Thomson, who was then a holder of 100 shares, fifty being old fully paid-up shares, and fifty being new shares on which £1 a share had been paid, and £99 a share remained as yet uncalled up. He died in 1875, and it is in respect of the liability to pay the £99 a share on the fifty shares which formed part of his estate that the question is raised in the petition. The other seventeen shareholders continued to be on the register till March, 1878, when the resolution to wind up the company was passed.

652] *The respondents, Peter Somervail, Thomas Somervail, Peter Clouston, Matthew Bullock, and John A. Callender, were the trustees and executors of James Thomson, and had got themselves placed on the register of the company as the holders of his old and new shares. Mr. Thomson had by his will directed that his trust property should be realized; and his trustees, on the 25th of October, 1876, “after mature deliberation resolved that, if an offer of not less than 40 per cent. on the amount paid upon the shares were received, they should be disposed of,” and Mr. Callender

submitted by a member to a meeting, beyond the matter contained in the notice given of such meeting, shall be intimated by sending a copy of the resolution to the registered office of the company at least seven days previous to the meeting; and a copy of such intimation shall thereupon be forwarded by the manager, or other official in charge for the time, to each member's

address as entered in the books of the company.

“(33.) All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend and the consideration of the accounts, balance-sheets, and the ordinary report of the directors.”

was authorized to accept such an offer on behalf of the trustees.

Mr. Callender, besides being one of the trustees of Thomson, was one of the directors of this company. After some negotiation between Mr. Callender and Mr. Rose, who was also a director, it was arranged that the shares of the testator should be purchased by the directors for the Bonnington Sugar Refining Company.

On the 17th of November, 1876, a minute was made, which was as follows:

Present: Messrs. Rose, Crabbie, Callender, and Weir, Directors. C. A. Rose, Secretary. The directors unanimously approved of the purchase by Messrs. Hugh Rose, John Crabbie, and John Weir, from the trustees of the late Mr. James Thomson, of Helensburgh, of his one hundred shares in this company at the price of 45 per cent. on the original cost; that is to say, the fifty old shares to be bought and paid for at the rate of £45 per share, and the fifty new shares or B stock in the same proportion on paid-up price. These shares to be held by them in trust for the Bonnington Sugar Refining Company, Limited.

It is not disputed that the purchase-money for the shares came out of the funds of the company. In December, 1876, a deed of transfer of the shares was executed by each of the respondents, and also by Hugh Rose, John Crabbie, and John Weir, which was in the following terms:

"We," Peter Somervail, Thomas Somervail, Peter Clouston, and Matthew Bullock, "as trustees of the late James Thomson," "in consideration of the sum of £2,272 10s. 0d. sterling, paid to us as trustees foresaid, by Hugh Rose, John Crabbie, and John Weir, do hereby transfer to the said" Rose, Crabbie, and Weir, in "trust for the Bonnington Sugar Refining Company, Limited, Leith, the fifty shares original stock of £100 each, numbered 226 to 275, and also the fifty shares new or B stock, numbered 926 to 975, all standing in our names as trustees foresaid in the books of the Bonnington Sugar Refining Company, Limited, to hold unto the" said Rose, Crabbie, and Weir, "in trust as aforesaid, their executors, administrators, and assigns, subject to the several conditions on *which we held the same [653 at the time of the execution hereof; and we, the" said Rose, Crabbie, and Weir, "do take the said shares in trust as aforesaid, subject to the same conditions."

In the register of shareholders of 1876 an entry was made

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of the transfer, and Rose, Weir, and Crabbie were entered as transferees in these words: "Hugh Rose, John Weir, and John Crabbie, in trust for the Bonnington Sugar Refining Company, Limited" (1).

The register for 1877 remained unaltered at the time when the resolution to wind up the company was come to in March, 1878, more than a year after the 11th of December, 1876, when the names of Rose, Weir, and Crabbie were entered as the persons who were the holders of the 100 shares which had been held by James Thomson in his lifetime.

On the 1st of February, 1877, the first general meeting of the shareholders after the purchase of the shares by Rose, Weir, and Crabbie in trust, was held. The circular convening the meeting was in general terms, and did not specify the exact business to be brought before the meeting. At that meeting nine out of the seventeen shareholders were present, representing 277 out of 450 shares, and they unani-654] mously approved of the transfer. At *this time the company was prosperous, and it was announced that a gross profit of £13,225 had been made during the preceding year.

On the 4th of February, 1878, the next general meeting was held, at which thirteen out of seventeen shareholders were present, representing 354 out of 450 shares. The minutes of the previous general meeting narrating the approval of the purchase were read and unanimously approved of.

(1) The two entries which related to the £100 shares in question appeared as follows on the Register of 1876:

Name of Shareholder.	Address.	Occupation.	No. of Shares held, original & new.	Date of Transfer.	To whom Transferred
The late James Thomson.	Millview, Helensburgh.	Merchant.	100	Feb. 16, 1876.	Peter Somervail, Thos. Somervail, Peter Clouston, Matthew Bullock, and John A. Callender, trustees of Jas. Thomson.
Peter Somervail, Thos. Somervail, Peter Clouston, Matthew Bullock, and John A. Callender.	As trustees for the late James Thomson, Esq., Helensburgh.	..	100	Dec. 11, 1876.	Hugh Rose, John Weir, and John Crabbie, in trust for the Bonnington Sugar Refining Company, Limited.

The report read at this meeting stated that the year had been one of unexampled calamity in the history of the company.

It was not until the adjourned meeting on the 4th of March, 1878, more than fifteen months after the execution of the transfer, that any objection was made to the purchase by the shareholders. At that meeting a protest was tabled by two shareholders, one of whom was at the time threatening proceedings for a judicial winding-up of the company.

Owing to the company's difficulties from sustaining losses a special resolution was passed on the 12th, and confirmed on the 27th of March, 1878, to wind up the company voluntarily; and the appellant, Mr. James Cree, was appointed the liquidator.

A call of £30 on each of the new shares was subsequently made, and served on, *inter alios*, the respondents, who refused to make payment on the ground that for more than a year previous to the winding-up they had ceased to be shareholders. The full extent of the calls not being sufficient to meet the liabilities of the company, the liquidator, being advised that the purchase of shares by Rose, Weir, and Crabbie in trust was *ultra vires* of the directors, presented a petition to the Court of Session for the purpose of having the names of the respondents as the trustees for James Thompson placed on the list of contributories in respect of the fifty new £100 shares upon which £1 had been paid up.

The respondents lodged answers, and submitted that the prayer of the petition ought not to be granted, in respect that they had long ceased to be members of the company; more particularly (1.) The transaction was a *bona fide* purchase and sale for a fair consideration, and was warranted by the provisions of the articles of association; (2.) It was on various occasions ratified and approved by the shareholders, and, *separatim*, was acquiesced in by them; (3.) The shareholders and the liquidators are barred [655] by *mora* and change of circumstances from repudiating the transaction. A proof was allowed by the court, and evidence was led which bore out the above facts.

On the 25th of October, 1878, the Court of Session (Lord Ormisdale dissenting) refused to make any order removing the names of Rose, Weir, and Crabbie from the register, holding, that the transfer to them was valid and effectual (*).

(*) Court Sess. Cas., 4th Series, vol. vi, p. 80; Scot. Law Rep., vol. xvi, p. 38.

On appeal,

May 13, 15. Mr. *Benjamin*, Q.C., and Mr. *Davey*, Q.C., for the appellant, while admitting that all parties had acted with perfect *bona fides*, and that there was no dispute as to the facts, contended that the articles of association of the Bonnington Sugar Refining Company gave no power to the company to purchase its own shares, and without such express power the purchase in trust for the company by three of the directors was *ultra vires*. It was void *ab initio*, and therefore incapable of ratification by the shareholders. The respondents relied on the 12th article; but the true meaning of that article was that if the shareholders did not consent to the admission of any proposed transferee, then it became the duty of the objecting shareholders to take the stock themselves, and many of the transfers showed this was the way in which this article had been carried out. It never intended to, nor did it in fact, give authority for the purchase by the company of its own shares. Also no opportunity had been given to the shareholders to purchase themselves, or to object to any proposed transferee.

The three persons Rose, Weir, and Crabbie, now on the register as the holders of Thomson's shares, were not, as a matter of fact, before the House, though served with the petition; but they had an indemnity against the company, therefore the question came back to the same thing as a purchase by the company. The only question was, had the respondents' names been omitted from the register without sufficient cause? Under the combined powers contained in sects. 98, 35 of Companies Act, 1862, the register could be restored to its original state before the purchase. [They 656] *cited *Riche v. Ashbury Railway Carriage Company* ('); *Ex parte Kintrea* ('); *Zulueta's Claim* ('); *Muir v. Glasgow Bank* ('); *Hope v. International Financial Society* ('); see also *Oakes v. Turquand* (').]

Mr. *Herschell*, Q.C., and Mr. *H. A. Giffard*, for the respondents, maintained that this was in effect a proceeding by the liquidator in favor of persons who were now on the register, to relieve them of liability. The company here had, in consistency with its private nature, a right of pre-emption of its own shares, in order to guard against the introduction of partners who might be obnoxious: articles 12 and also 17 of association ('). But apart from any

(¹) Law Rep., 7 H. L., 653; 14 Eng. R., 42.

(²) Law Rep., 5 Ch. Ap., 95.

(³) *Ibid*, 444; Law Rep., 9 Eq., 270.

(⁴) *Ante*, p. 236.

(⁵) 4 Ch. D., 327; 19 Eng. R., 833.

(⁶) Law Rep., 2 H. L., 325.

(⁷) *Ante*, pp. 387, 388.

such right the sale here was competently made, and the respondents were effectually divested by the transfer to the three persons Rose, Weir, and Crabbie, who were *sui juris*, and who had, as between the respondents and the company, no legal incapacity to hold shares. If the transferees, acting without proper authority, took on a trust which might be a void trust, the transferees must bear the burden of the contract. But there was no illegality in these three persons, who were directors, holding these shares in trust for the company; and a majority of the shareholders had ratified the transaction. The capital of the company, which meant the shares, had not been reduced, for the shares were still in existence. When the transfer was executed, the company had just earned a large profit; and for more than a year the respondents had ceased to have any interest in the company: see 38th sect. Companies Act, 1862. *Riche v. Ashbury Railway Carriage Company* (*) did not apply. [They also cited and commented on *Ward and Henry's Case* (*); *Ex parte Ward's Case* (*); *Ex parte Sargent's Case* (*); *Elkington's Case* (*); and Nos. 17, 22, 25, of the articles of association of the company (*).]

Mr. Benjamin, Q.C., in reply.

*The Law Peers having taken time to consider [657 their judgment, delivered the following opinions:

June 20. EARL CAIRNS, L.C.: My Lords, I understand from the judgments of the learned judges of the Court of Session in this case that Lord Gifford and the Lord Justice Clerk (*), who formed the majority of the court, and who decided in favor of the respondents, were of opinion that the Bonnington Sugar Refining Company had by the operation of the 12th of its articles of association the power of purchasing its own shares. I am unable to adopt that interpretation of the 12th article. It may be open to doubt by what persons or in what manner shares within the meaning of that article are to be bought in the event of the necessary consent to a transfer being refused; but it is perfectly clear to me that in the case before your Lordships that article was not brought into operation; no person intended to act or supposed he was acting under it, and any sweeping determination by the company, or the shareholders, to

(*) Law Rep., 7 H. L., 653; 14 Eng. R., 42.

(*) Law Rep., 2 Ch. App., 511, at page 522.

(*) Law Rep., 2 Ch. App., 431.

(*) *Ante*, p. 388.

(*) Law Rep., 3 Ex., 180.

(*) Court Sess. Cas., 4th Series, vol

(*) Law Rep., 17 Eq., 273; 7 Eng. R., vi, pp. 91, 102.

refuse assent to transfers under that article, for the purpose of becoming themselves owners of the shares, would, in my opinion, have been an exercise not in *bona fide* of the power given by that article.

The appellant is the liquidator of the company, and he applies to the court to find that the names of the respondents should be placed on the list of contributories of the company in respect of fifty shares on which £1 a share has been paid up. He makes this application under the combined operation of the 98th and 35th sections of the Companies Act, 1862, and the application becomes, as was admitted at the bar, an application to the court under the 35th section to rectify the register by removing the names of Rose, Weir, and Crabbie, who now stand upon the register in respect of these shares, and by substituting the names of the respondents, upon the ground that the former have been entered without sufficient cause, and that the names of the respondents have been without sufficient cause omitted from the register.

My Lords, there appears to me to be no doubt as to the 658] circumstances *under which the change of names in the register took place. The shares belonged to the late Mr. James Thomson, and the respondents are his trustees. The company through its directors were willing to buy and the respondents were willing to sell these shares, and an arrangement was made that Rose, Crabbie, and Weir should purchase the shares and hold them for the company. This is made perfectly clear by the minute of the meeting of the directors of the 17th of November, 1876. [Having read the minute, *ante*, p. 652.]

It is not disputed that the purchase-money for the shares came out of the funds of the company. A transfer of the shares was made by the respondents. [Having read the transfer, set out *ante*, p. 652.] In the register of shareholders an entry was made of the transfer, and Rose, Weir, and Crabbie were entered as transferees in these words: "Hugh Rose, John Weir, and John Crabbie in trust for the Bonnington Sugar Refining Company, limited."

All this took place on the 11th of December, 1876, more than fifteen months before the winding-up of the company.

In the argument at your Lordships' bar it was strongly urged that the effect of the transaction was the same as if the company had obliterated these shares from their capital, or had taken a transfer of them into their own name. It was said that the transaction and every part of it was absolutely void; that the respondents were to be looked upon

as they stood on the register before the 11th of December, 1876; and that no attention was to be paid to the transfer into the names of Rose, Weir, and Crabbie.

I cannot take this view of the case. I do not express any opinion as to what rights there may be, or as to whether there are any rights, on the part of the company, or those who represent them, to recall the money paid to Mr. Thomson's trustees, nor is it necessary that I should express any opinion as to what the rights of the shareholders of the company *inter se* might be if there were no creditors to be considered. But the rights of creditors have intervened, and those rights the liquidator represents as well as the rights of the company. Rose, Weir, and Crabbie have been on the register as the persons responsible for these shares during a period of upwards of a year. There is no doubt that *they came into that position expecting to be indem- [659
nified by the company for anything they might be called upon to pay, and that indemnity they may not be able to enforce; but with that matter it appears to me the creditors have nothing to do. To outside creditors they stand upon the list just as any other persons professing to hold shares upon trust, and creditors are not concerned to inquire into the rights existing between them and those for whom they profess to be trustees. It appears to me to be clear, according to the principles laid down by this House in *Oakes v. Turquand* (*), that Rose, Weir, and Crabbie could not as against the creditors come forward and claim to have their own names taken off the register, and so, in my opinion, neither can the appellant do this in order that he may place upon it the names of the respondents.

It was contended in the argument at the bar that the principle on which *Muir's Case* (*) was decided in the Glasgow Bank litigation ought to tell in favor of the appellant. I look upon that decision as opposed to the appellant's argument. The directors of the company in purchasing these shares felt that it was requisite that the shares should be held out to the world upon the register as owned by individuals, and to this the individuals assented. Beyond this creditors had no occasion to look, and they would be entitled to assume, according to the decision in *Muir's Case*, that whatever amount of liability attached to the shares was assumed by the individuals in whose name they stood, and that this liability was not in any way diminished or derogated from by the reference to the trust upon which they were held.

(*) Law Rep., 2 H. L. 325.

(*) *Ante*, p. 236.

I, therefore, move your Lordships that the appeal be dismissed with costs.

LORD HATHERLEY: My Lords, I entirely concur.

The question whether or not this company has power to reduce its own capital, and whether or not it can do so by virtue of the operation of the 12th clause of the articles of agreement, appears to me, as it has appeared to my noble and learned friend, to be wholly beside the question we have now to consider. In the transaction which took place 660] *there was no attempt to absorb or merge the capital of the company; on the contrary, the company seems to have thought it right that it should be carefully preserved from such merger—that these shares should be carefully kept distinct and separate from the general body of the capital of the company which might be considered to be (if there be any) unappropriated, by taking care that the shares themselves should be vested in the persons named (and whom it is now sought to remove from the register) as actually owning those shares; as keeping those shares on foot for the benefit of the company, it is true, but as owning those shares distinct from the rest of the shares. As to any question of diminishing the capital, or of merging the capital by what was done, I see no trace of it. Then I see no facts to support the argument that the transaction was such that it must have been known to all parties concerned, I mean to strangers as well as to proprietors in the company, how the transaction had been brought about. Now all they would see upon the register would be this; in place of those gentlemen who had held the shares as the trustees of Mr. Thomson (the respondents), they would see as owners of these shares the names of Rose, Crabbie, and Weir, and they would see as a fact that they had come in by assignment from the trustees of Mr. Thomson. They would see further that they held these shares in trust for the company, but there would be no impossibility of their having come in in a perfectly legitimate way. I am not pronouncing any opinion upon the other view of the case, namely, supposing this had been an attempt to merge the shares, but I say merely there was nothing, as the matter now stood, before the eyes of any stranger, considering whether he should become a shareholder in this company or not, to call for further investigation on his part. He would see that certain shares had been taken by persons who had accepted the position of shareholders in the full sense and were entitled to a share of all profits and liable in respect of all

losses sustained by the company, but still as trustees for the company.

The question arising from their being trustees (I do not now say trustees for the company) was disposed of in *Muir v. The City of Glasgow Bank* ('). The mere fact of their being trustees would *not be a thing that would re- [66] quire a purchaser to investigate the matter further. As to their being trustees for the company, that might be perfectly legitimate and lawful, whatever view be taken of this case. I am not, as I have said, pronouncing any opinion as to what would have happened, if the nature of the transaction had been different, if it had been for the purpose of merging the shares. But those shares might have become vested in a variety of ways in trustees for the company, without their being necessarily the purchasers of them. For instance, Mr. Thomson by his own will might, if he had thought fit, or if he had thought such a course was desirable for his own purposes, have made a bequest of these very shares to certain persons as trustees for the company, or he might have made a bequest of them to the company itself, and the company might have found trustees to hold the shares as trustees for them, and to be answerable to third parties in respect of them.

That being so, I apprehend that there is nothing to induce us to say now, after these shares have been registered, as they have been, and after they have been open to all the world as so registered, for more than a year, that the course can be taken of removing these names from the register for the purpose of putting in the names of the original parties who held the shares. I think that would be entirely in the face of the decision in *Oakes v. Turquand* ('). The parties are met on the one hand by the decision in *Oakes v. Turquand* ('), when they seek to remove from the register the names which creditors may have seen there for fifteen months; and, on the other hand, if they seek to remove those names from the register in consequence of their being entered as trustees on the register, then they are met by the case of *Muir v. The City of Glasgow Bank* ('). Therefore they are met either way, and unless there is some third ground of acting, which has not yet come in controversy with reference to matters of this description, the application must fail. I do not say whether there might be any other ground on which a controversy might be raised, but unless they could make out that these shares had been actually merged, if the question had arisen before us as to whether

(') *Ante*, p. 236.

(') Law Rep., 2 H. L., 825.

there was a power of merging capital, or some question such 662] as that, which was *attempted to be argued, but not very successfully, except upon some new ground such as that, I do not see why that which is sought by the liquidator should be conceded to him.

I think the proper course was taken by the learned judges in the Court of Session, namely, to refuse to make any order removing these names from the register, and I think that your Lordships' House should sanction that course; and the consequence follows that this appeal should be dismissed.

LORD O'HAGAN: My Lords, concurring as I do in the conclusion at which my noble and learned friend on the woolsack has arrived, and in the reasons which he has very succinctly given to your Lordships, I do not think it necessary to repeat those reasons or to restate the short facts on which they have been founded. I shall merely say a few words in sustainment of the view expressed by my noble and learned friend.

The real purpose of the appellant is to obtain a rectification of the register by substituting the names of the respondents, as former holders of the shares, for those of the persons in whom they are at present vested. I do not think that we are warranted in permitting this, upon any of the grounds presented at the bar. No doubt the whole transaction was *bona fide*. No doubt, Messrs. Rose, Crabbie, and Weir openly and honestly purchased the shares in trust for the Bonnington Company; and, no doubt, the money which paid for them was supplied from the funds of that company. On these points, the transfer from the trustees and the resolution of approval of the 17th of November, 1876, furnish conclusive evidence, and there is no real controversy as to the facts. Neither has there been any as to the legal incapacity of the company to become the purchaser of its own shares, unless the purchase was authorized by the memorandum and articles of association. And, on the construction of the 12th of those articles, I am not prepared to say that my opinion concurs with that of the majority of the Scottish judges, which notwithstanding, in the result and for other reasons, I approve. If I were driven to sustain their judgment merely on that section, I should more than hesitate. There is much obscurity in the wording of it; but 663] it seems to me to have *been framed *diverso intuitu*: to regard a state of things such as we have not to deal with, and never to have been contemplated as warranting the impeached act of purchase, at the time when that act was done. It

points to a transaction by individual shareholders and not by the company, and the chairman, Mr. Rose, states expressly that the right of pre-emption set forth in the 12th article "was never exercised." So far, I am disposed to go with the very able judgment of Lord Ormildale.

But, however irregular may have been the proceeding by which the present registered shareholders acquired possession of the shares, whatever may be ultimately the legal ascertainment of their relations with the company for which they bought in trust, and from which they were reasonably justified in expecting indemnity, and whether or no the shareholders could be successful in seeking a return of the money advanced to the trustees—I do not see that we can now obliterate from the register the names of the purchasers and put others in their place. I agree with the Lord Chancellor that such a rectification could not be effected at the instance of the registered transferees, and no sufficient reason has been given for making it at the instance of the liquidator.

Messrs. Rose, Crabbie, and Weir, thought proper, at the desire of the company, to buy the shares. They paid the price: they took the transfer: they allowed themselves to be registered and incurred all the responsibilities, and acquired all the rights, attendant on registration: they held themselves out to the world as the owners of the shares and pledged their credit to those who had dealings with the company. And, having regard to the principles on which this House has acted, very recently, in a series of most painful cases⁽¹⁾, I cannot see that they could be exonerated in a proceeding against them by creditors whilst their names remain on the register, or that they would be able to procure exoneration by any attempt to alter the entries there. If such an alteration could not be made, affecting their position and the relations and liabilities of those connected with them, by any effort of their own, it seems to me impossible to hold that the liquidator can prevail, when he asks to substitute one set of names for another and diminishes, [664 it may be in a most serious way, the value of the security on which creditors may have relied.

The disclosure of the fiduciary character of the registered transferees could not, this House has held, diminish their personal liability. It might afford, as Lord Gifford observes in the case before us, "a very good proof of trust as in a question between them and the beneficiaries for whom they are trustees." But the statement was dictated by themselves

⁽¹⁾ *Ante*, p. 386.

and not by the persons assigning to them; and it did not concern those to whom their voluntary acceptance of the position of registered shareholders made them responsible. Whatever may have been the original taint of the transaction or the effect of the subsequent ratification by which it is said to have been validated, and whether as between the company and their trustees it was valid or not, I do not think that we can now alter the condition of the register with such consequences as I have indicated; and I therefore support the proposal made by my noble and learned friend.

LORD BLACKBURN, having stated the facts as above, at p. 649:—I agree with the opinion expressed by the noble and learned Lords who have already spoken that, whatever be the true construction of the 12th article the parties in this case were not acting under it.

By sect. 23 of the Companies Act, 1862, every person who has agreed to become a member of a company under this act, and whose name is entered on the register of members, shall be deemed to be a member of the company; and by sect. 37 the register of members shall be *prima facie* evidence of any matters by this act directed or authorized to be inserted therein; but independently of sect. 37 what was entered on the register was true; the transferees had agreed to become members of the company.

If this had been an English or Irish company no notice of any trust could have been entered on the register. But as this was a Scotch company it was lawful to enter a notice of trust on the register, and accordingly it is entered that the transferees held the shares "in trust for the Bonnington Sugar Refining Company, Limited," and so much the creditors 665] ought to have known. On *this much the appellant's argument was founded. I will notice it presently.

In the meantime I will proceed to state those matters which are not stated on the register, and which, being unknown to those who during those fifteen months trusted the company, cannot diminish the rights of the creditors. If the creditors (or the liquidator acting for them) had made a case that the transferees were men of straw, whilst the original transferors were solvent; or any other case showing that the keeping of the register as it is was prejudicial to the creditors, and on that ground had sought to have the register rectified, different considerations would arise; but no such case is set up. The transferees are, as far as appears, quite as capable of paying the calls as the transferors, and in truth this seems really to be an application in the interest of Messrs. Rose, Weir, and Crabbie, who, if they have any

ground for removing their names, should make the application themselves, and not in the name of the liquidator.

The testator Thomson had by his will directed that his trust property should be realized; and his trustees on the 25th of October, 1876, "after mature deliberation resolved that, if an offer of not less than 40 per cent. on the amount paid upon the shares were received, they should be disposed of," and Mr. Callender was authorized to accept such an offer on behalf of the trustees.

Mr. Callender, besides being one of the trustees of Thomson, was one of the directors of this company. After some negotiation between Mr. Callender and Mr. Rose, who was also a director, it was arranged that the shares of the testator should be purchased by the directors for the Bonnington Sugar Refining Company. There was no disguise about the matter; a minute was made which has been already read (*).

The transfer was then prepared, and the price was paid out of the funds of the company, and Mr. Callender at least knew that price was paid out of the funds of the company, which I think ought not to have been done, though it is probably not necessary for your Lordships to decide this.

It has been argued that this transaction was illegal as being an attempt to reduce the amount of the share capital, and in effect *extinguish the 100 shares. It certainly [666 was not intended to have any such effect; and though, if the shares had been conveyed direct to the company and the company been entered on the register as holders of these shares, it might have been argued that (whatever was intended) the legal effect was to extinguish the shares, no such consequence follows from conveying the shares to three men *sui juris*, fully competent to agree to be members of the company, and able to fulfil all the conditions attending on being members; and entering their names, with their assent as the persons holding the shares, though at the same time declaring on the register that the shares were to be held by them in trust for the company.

But the case of *Ashbury v. Riche* in this House (*) determines that the true construction of the Companies Act, 1862, is that companies incorporated under it are authorized to trade in the manner authorized by the memorandum of association *and in no other*; and that it is not only beyond the authority of the managing body to enter into any contract beyond its scope, but also *ultra vires* of the company itself. And this certainly goes a great way to establish

(*) See *ante*, p. 429.

(*) Law Rep., 7 H. L., 653; 14 Eng. R., 52.

that the application of the funds of the company to the purchase of those shares was an application of their funds to an illegitimate purpose, and that it could have been prohibited whilst still executory, even if every existing shareholder had assented to it. If the case made here by the appellant had been one of repetition claiming to get back this money from the respondents, they would have had to refund it or to defend themselves from that claim as they best might; but no such case is made.

It appears here that a large majority of the shareholders knew of this purchase, and approved of it. Even if they had unanimously approved of it, that would not have affected the question whether the company was bound by this improper application of its funds. But if those approving shareholders, or if the four directors, who certainly were parties to the application of the funds, had, on being told that the application of the company's funds to such a purpose was wrong, subscribed and replaced the sum so misapplied, it would have completely rectified the mischief arising from the collateral illegality: it would seem that the [667] *appellant's argument requires them to maintain that even in that case the transfer would still be entirely illegal, and after any lapse of time might be set aside. This, I think, is a question quite collateral to that meant by the petition, and that it is unnecessary to express any opinion on it.

The same case of *Ashbury v. Riche* (1) goes a great way to say that when the directors requested Messrs. Rose, Crabbie, and Weir to hold these shares as trustees for the company, and thereby, impliedly though not expressly, engaged to indemnify them against the consequences of their so doing, they made an engagement which, so far as it professed to bind the company, was not merely beyond their authority as mandatories for the company but also an engagement beyond the competency of the company itself, and consequently that these gentlemen, if called on to pay calls, can only have recourse against those individuals, if any, who requested them to incur this liability. This is a question to be raised by Messrs. Rose, Crabbie, and Weir, who being not parties to this litigation, at least in form, may perhaps in some other process show that the facts here were misapprehended. But as it seems to me, this question also is quite collateral to that raised by the petition in this case. The prayer of the petition is, that the respondents should be placed on the list of contributories, a prayer which neces-

(1) Law Rep., 7 H. L., 653; 14 Eng. R., 52.

sarily involves that the register of shareholders should be rectified by taking off the names of Messrs. Rose, Crabbie, and Weir. The argument is, that this should be done because to hold shares in trust for such a company is in itself a legal impossibility or rather illegality. The argument must, I think, be pushed to this extent, that even if the transferees had at the time of the transfer believed that they could have no legal claim for indemnity against the company, and had in express terms said that they would make no such claim, relying for indemnity entirely on the moral obligation of those who, being shareholders, approved of their conduct, the trust would be illegal.

This is a position which seems rather startling. No authority exists for it, and if the point arises here, which I doubt, I think your Lordships should hold that it is not correct.

I therefore entirely agree in the motion proposed.

*LORD GORDON: My Lords, I concur in the [668 opinion which has been expressed by your Lordship on the woolsack.

I think the transaction in question does not fall under the 12th section of the articles of association; and I am also of opinion that that section does not confer on the company the power of purchasing its own shares.

But while I am of that opinion, I also think that the appellant is not entitled to have the names of the respondents placed on the list of contributories of the company. The names of the respondents were removed from the register of shareholders more than fifteen months before the commencement of the winding-up of the company; and on the removal of the names of the respondents the names of Messrs. Rose, Weir, and Crabbie were substituted in their place. I think it is not necessary for the disposal of this case to express any opinion as to the liabilities of these gentlemen, who are not represented in the present proceedings. But, as their names were put on the register, and were on the register at the time of the winding-up of the company, I think that *prima facie* they must be held to be rightly on the register, and while their names remain on the register I think the appellant has neither right nor title to apply to have the names of the respondents restored to it.

I think the circumstance that the names of Messrs. Rose, Weir, and Crabbie appeared on the register as holding the shares "in trust" for the company does not affect the question involved in the present application. Those words may or may not affect the personal liability of these gentlemen,

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but that is a point which your Lordships are not now called on to decide.

I am therefore of opinion that the result arrived at by the Court of Session was right, and that the appeal should be dismissed.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 20th June, 1879.

Agent for appellant: *William Robertson.*

Agents for respondents: *Phelps, Sidgwick & Biddle.*

[4 Appeal Cases, 669.]

J.C. (*), June 19, 1879.

[PRIVY COUNCIL.]

669] *The Owners of the Vessel BYFOGED CHRISTENSEN, *Appellants*; and The Owners of the Vessel WILLIAM FREDERICK, *Respondents*.

THE WILLIAM FREDERICK—THE BYFOGED CHRISTENSEN.

CONSOLIDATED CAUSES.

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF GIBRALTAR.

Collision—18th Rule—Contributory Negligence.

It is dangerous to the public to leave to masters of vessels a discretion as to obeying or departing from the sailing rules; and accordingly such a discretion need not be exercised except in cases of very clear necessity.

Where a collision has occurred owing to one colliding vessel having failed to observe (as its duty was) the rule of the road, by keeping out of the way, *held*, that in the absence of proof as to the particular time at which an intention to violate that rule was clearly manifest, the other colliding vessel, being *prima facie* bound to observe the 18th rule by keeping on its course, would not have been justified in departing therefrom.

The Commerce (1) commented upon.

APPEAL from a decree of the Vice-Admiralty Court of Gibraltar (Dec. 4, 1878).

The appellants sued the respondents in the court below for the recovery of damages in respect of a collision which took place between the Byfoged Christensen and the William Frederick. The respondents about the same time instituted a cross cause against the appellants in respect of the same collision, and the two actions were by consent heard at the same time upon the same pleadings and evidence, and

(*) *Present*:—SIR JAMES W. COLVILLE, SIR ROBERT PHILLIMORE, SIR BARNES PEACOCK, and SIR ROBERT P. COLLIER.

(1) 3 W. Rob., 287.

but one judgment was pronounced and one decree made in the consolidated causes.

The facts are stated in the judgment of their Lordships.

*Mr. *C. P. Butt*, Q.C., and Mr. *Stubbs* (Dr. *W. G.* [670 *F. Phillimore*, with them), for the appellants.

Mr. *Milward*, Q.C., and Mr. *Clarkson*, for the respondents.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILLE: The collision out of which these appeals have arisen took place a few miles from Cape Sparte on the 26th of August, 1878, about five o'clock in the afternoon. The colliding vessels were the *Byfoged Christensen*, a Norwegian bark, and the *William Frederick*, an American three-masted schooner. The former vessel was bound on a voyage from Majorca to New York, and was therefore coming out of the Mediterranean. The other vessel was bound on a voyage from New York to Venice, and was therefore entering the Mediterranean. They were sailing and crossing vessels, and the sailing rules applicable to the case are the 12th and the 18th.

Both parties are agreed that the American vessel was on the port tack and had the wind on the port side, whatever was the precise direction from which the wind was coming. Hence the appellants have correctly contended that it was only in case the *Christensen*, which had the wind on her starboard side, was free that it would be her duty to keep out of her way; and that, if she were not free, it would be the duty of the American ship to keep out of her way.

The case is peculiar, because each vessel seems, up to the moment of collision, or at least up to the time when the collision became inevitable, to have kept its course, and to have acted as if it were the duty of the other vessel to keep out of its way. The question which of the vessels was right in throwing that obligation on the other depends upon the question what was the real direction of the wind. The *Christensen* contends that the wind varied from north and by west to north; the other vessel says that it was from north-north-east to north, and by east. The difference between them is not less than one, or more than three points of the compass. Their Lordships have no difficulty in coming to the conclusion that if the direction of the wind was north and by east, *or north-north-east, or anywhere [671 between those two points, the *Christensen* would have been free within the meaning of the 12th rule. The learned judge of the court below has, upon very conflicting evidence,—each crew swearing pretty consistently to the direction for which each contended,—found that the wind was to the east of

- north, and their Lordships would not, without having strong grounds for coming to a contrary conclusion, be disposed to interfere with that finding of fact. An argument on the part of the appellants was founded on the following passage in the judgment under appeal. The learned judge there says: "I feel therefore compelled, but after much hesitation, to decide that the Byfoged Christensen had the wind, if not altogether free, at all events some points more in her favor than the William Frederick, and that according to the 12th rule of the road she ought to have given way to the William Frederick." Upon this passage it was argued by Mr. Stubbs that it is consistent with the hypothesis that both vessels were close-hauled vessels, in which case it would be the duty of the vessel which had the wind on the port side to give way. There may be some ambiguity in the first part of the sentence; but taking the whole sentence together, their Lordships cannot but think that it amounts to a finding that the Christensen was a free vessel within the meaning of the 12th rule of the road; and even if there had been greater ambiguity in the expression of the learned judge's judgment than their Lordships think there is, they would still think that if the direction of the wind was properly found to be what he found it to be, the Christensen would have been a free vessel, and in that opinion they are confirmed by their nautical assessors.

The next question is whether the finding as to the direction of the wind was justified by the evidence. It seems to their Lordships that it was so. The most plausible point made against that finding was the argument of Mr. Butt as to the position of the vessels at the time of the collision. He contended, that had the wind not been as it was stated by those on board the Christensen, to be, that is, varying from north to north and by west, the vessel would not, according to the ordinary course of navigation, have been so near Cape Spartel as she was when the collision took place. But on consultation with the sailing masters, their Lordships [672] *find that she was upon the course which a vessel bound to New York, and getting out of the Mediterranean, would naturally have taken, and that her position at the time of the collision was by no means inconsistent with the fact that the wind was in the quarter in which the American vessel and its crew say that it was.

That being so, their Lordships have no difficulty in affirming the decision that it was the duty of the Christensen, according to the rule of the road, to keep out of the way of the other vessel, and that she failed to do so.

The question raised by the cross-appeal arises upon the finding of the learned judge that both vessels were to blame, on the ground that although the duty of keeping out of the way lay upon the Christensen, those on board the William Frederick, when they found that the other vessel was not going to perform its duty, ought not to have pertinaciously adhered to the 18th rule of the road by keeping on their course, but should have adopted some manœuvre in order to avoid the collision which afterwards took place. The learned judge in so deciding, relied on the case of *The Commerce* (1), before Dr. Lushington. Their Lordships desire to remark that though the principle involved in that case may be in itself a sound one, it is one which should be applied very cautiously, and only where the circumstances are clearly exceptional. They conceive that to leave to masters of vessels a discretion as to obeying or departing from the sailing rules is dangerous to the public; and that to require them to exercise such discretion, except in a very clear case of necessity, is hard upon the masters themselves, inasmuch as the slightest departure from these rules is almost invariably relied upon as constituting a case of at least contributory negligence. In the present case, their Lordships think that the principle of the decision in the case of the *Commerce* is not applicable. There is no *constat* at what particular time the master of the William Frederick ought to have come to so distinct a conclusion that the other vessel was not about to obey the rule as to justify his departure from what was his *prima facie* duty. Their Lordships cannot infer from the facts proved in the case that he was bound to come *to such a conclusion before the moment at [673 which it appears he luffed up in the wind; and after consulting with the sailing masters, they have come to the conclusion that that was the best thing which, under the circumstances, he could have done; that if he had tried by any other manœuvre actively to get out of the way of the other vessel, there would still have been a collision, and that the consequences of that collision might have been aggravated owing to the greater way which his vessel would have had upon it. Their Lordships therefore think that no case of contributory negligence has been made out against the William Frederick, and they must humbly advise Her Majesty to allow the cross-appeal, to reverse the decision of the court below, to pronounce that the Byfoged Christensen was alone to blame for the collision, to dismiss the suit of the owners

(1) 3 W. Rob., 287.

of that vessel, and to condemn them to bear and pay the whole amount of the damages sustained by the William Frederick, and further to pay the costs of both suits in the court below, and also the costs of these appeals.

Solicitors for appellants: *Stokes, Saunders & Stokes.*

Solicitors for respondents: *Thomas Cooper & Co.*

[4 Appeal Cases, 674.]

J.C.(*), July 5, 8, 26, 1879.

[PRIVY COUNCIL.]

674] *JOHN KINDLAN COLLINS, *Defendant*; and JAMES LOCKE, *Plaintiff*.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF VICTORIA.

Agreements in Restraint of Trade—Reasonableness of the Restraint—Arbitration Clause—Award not a Condition Precedent to Right of Action.

Agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and reasonable in relation to the objects of the contract; and also unless they are made upon a real and *bona fide* consideration.

Where the object of an agreement is to parcel out the stevedoring business of a particular port amongst the parties to it, and so to prevent competition, at least amongst themselves, and also, it may be, to keep up the price to be paid for the work:

Held, that such agreement is not invalid, if carried into effect by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade.

A provision that if a particular merchant named in the agreement should refuse to allow the stevedoring of any ship to be done by the party entitled to it under the agreement, and should require one of the other parties to do it, such party so required should give an equivalent to the party who lost the stevedoring, is not unreasonable either as regards the party entitled or as regards the merchant.

But a provision that in the case of ships passing out of the hands of merchants named in the contract into the hands of other merchants, who should not choose to employ the party entitled under the agreement, all the parties thereto are deprived of the work, cannot be justified. It is obviously detrimental to the public, is entirely beyond anything the legitimate interests of the parties required, and is utterly unprofitable and unnecessary, at least for any purpose which can be avowed.

A clause which stipulates that all matters in difference which should arise touching the agreement should be submitted to arbitration, and prohibits any action being brought in respect of the matters actually submitted to arbitration, is a collateral and independent agreement, and an award thereunder is not a condition precedent to such action, except as regards such sums as under the agreement are not payable until the amount thereof has been ascertained by such award.

APPEAL from two judgments of the Supreme Court (April 4, 1877), one discharging a rule *nisi* which had been obtained 675] for a *new trial, and the other allowing a demurrer to two of the defendant's pleas.

(*) *Present*.—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

On the 7th of October, 1870, the appellant and the respondent, and other persons then carrying on the business of stevedores in the port of Melbourne, entered into an agreement under seal for the purpose of preventing competition. The effect of the agreement (the main provisions of which are set out in their Lordships' judgment) was as follows: The parties agreed that as between the parties thereto the appellants should be absolutely entitled to the business of stevedoring all ships that should arrive at Melbourne consigned to the firm of J. H. White & Co., the respondents should be entitled to the business of stevedoring all ships that should arrive at Melbourne consigned to either of the three firms, Messrs. Holmes, White & Co., Messrs. R. Towns & Co., and Messrs. King, Meng & Co., and the other parties should be entitled to the business of stevedoring ships consigned to certain other firms therein mentioned; and that they would not undertake or be in any way concerned in or interfere in, in whole or in part, the stevedoring of any ship consigned to any of the firms therein mentioned except in accordance with the agreement.

That if either of the firms refused to allow the stevedoring of any ship consigned to them to be done by the party entitled to it under the agreement, but should require any other of the parties to do it, the party doing it would give an equivalent to the persons so losing the stevedoring of an amount to be determined by arbitration.

That the stevedoring of all ships not consigned to any of such firms should be undertaken by the parties (other than the respondents) in turn in the order of their arrival.

That if any of the named firms should cease to do business, or the proportion of ships consigned to them should be materially altered, a readjustment should be made between the parties to the agreement, and in case of any firm having ceased to do business, the parties losing such firm should be entitled to select another carrying on business of equal importance.

That in case of disagreement the matter should be referred to arbitration.

*That the parties would not directly or indirectly aid [676 in the establishment of other firms of stevedores. That all disputes should be referred to arbitration, and that the parties should not be entitled to commence or maintain any action at law or suit in equity in respect of the matters so submitted as aforesaid, except for the amount or amounts by the said award determined to be paid by any one or more of the said parties to the other or others of them.

The facts are stated in the judgment of their Lordships.

The respondent filed his declaration dated the 10th of February, 1877, and containing counts in effect as follows:

1. The stevedoring by the appellant of certain ships which arrived consigned to Holmes, White & Co., that firm not refusing to allow the respondent to work for them.

2. The refusal of the appellant to pay an equivalent to the respondent for the stevedoring of certain ships which arrived consigned as aforesaid, and which the said firm employed the appellant and refused to allow the respondent to stevedore.

3. The stevedoring by the appellant of ships which arrived consigned to Messrs. Stewart & Couch, a firm which the respondent had selected instead of Messrs. R. Towns & Co., on the latter ceasing to carry on business, although Messrs. Stewart & Couch did not refuse to allow the respondent to stevedore.

The particulars of breaches gave the names of three ships, Jason, Clara, and Eastern Monarch, as those to the work of which the respondent claimed to be entitled under the said agreement.

The appellant on the 15th of February, 1877, pleaded five pleas:

1. That the deed was not his deed.

2. A denial of the alleged breaches.

3. That the respondent had not referred the difference to arbitration in accordance with the terms of the agreement.

4. That there was no consideration to the appellant for the execution of the indenture of agreement save as appears therein.

5. As to the third count or breach, that the respondent had not pursuant to the terms of the agreement selected Messrs. Stewart & Couch to replace Messrs. R. Towns & Co. 677] *6. As to the same, that the other parties to the agreement had not agreed to such selection.

The respondent took issue on the first, second, fifth, and sixth pleas, and demurred to the third and fourth.

The jury found a verdict for the respondent for £280 in respect of the Clara and Eastern Monarch, and contingently for £75 in respect of the Jason. Leave was reserved to either party to move to enter the verdict, and to the defendant to reduce the damages.

On the 23d of March, 1877, the appellant obtained a rule *nisi* to enter the verdict for the defendant, or reducing the damages to £20.

On the 4th of April, 1877, the rule *nisi* was discharged with costs; and final judgment was entered up as follows: Verdict for the plaintiff. on the first and third counts, damages £280, costs £140 5s. 10d., and verdict for defendant on the second count: Plaintiff's demurrers allowed.

The following reasons were stated by the Supreme Court:

Stawell, C.J.: "The question under this rule *nisi* is, as to the sound construction of the first covenant, considering the second only as far as it applies to the first. What is the meaning of 'arrive consigned?' does it continue to apply to the ship after she has left the hands of the firm to which she was consigned on that voyage, and while she remains in the port of Melbourne? It turns on the way in which the word 'consigned' is treated in the after part of the first covenant, not on the meaning of the word 'arrive'; I think that it is not limited to the time during which the ship remains in the hands of the firm to whom she was consigned. If a stevedore other than the one to whom this contract allotted her is employed, then the former is to give an equivalent to the latter. The rule must be discharged."

Fellows, J.: "The meaning of the contract is that certain shipping firms in this port are to be divided into four sets, one set being allotted to each party to the agreement, and that every ship consigned to one of these firms is to be worked by the party to whom the set comprising that firm was allotted, if he can get her. It is possible that firm may not wish to give the ship to the *stevedore to whom [678 she has been allotted, or the person to whom the ship may afterwards be chartered, may be unwilling to do so. In one of these events, one of the other parties may do the work, in the other case the others may not; and the ship is, so to speak, tabooed to them all. The jury took the latter view, and, though it was not a question for them, they have decided rightly, and the damages assessed must stand. Rule discharged."

Upon the demurrers the court delivered judgment as follows:

Stawell, C.J.: "The second breach is for not paying an equivalent for the stevedoring of a ship, which, by the request of the consignee, was stevedored by the defendant. The contract is, in effect, to pay an 'equivalent to be determined by arbitration.' Until, therefore, the equivalent has been so determined, no action can be brought for it, and the second breach is consequently bad. This indeed was almost conceded in the argument.

"The other breaches are framed on the contract that the

defendant will not stevedore any ship which by the agreement is allotted to the plaintiff. That covenant has been broken, and as there is no stipulation in it making it necessary to have the damages occasioned by the breach of it ascertained before suing, the plaintiff is entitled to sue for them in the ordinary way.

"There is, however, a distinct covenant that all disputes shall be referred to arbitration. That covenant is quite independent of the other, and may be broken by the plaintiff without depriving him of the right to sue for the defendant's breach of the absolute covenant not to stevedore. The agreement to refer is in no sense a part or 'condition' of the covenant not to stevedore. It was therefore quite unnecessary to arbitrate before suing, and the breaches assigned on it are consequently free from objection on that score.

"It was, however, urged by the defendant that the whole contract was void as being in restraint of trade, and *Hilton v. Eckersley* (') was relied upon in support of that objection. It is not, in our opinion, an authority which applies to the present case. There is not in this contract any stipulation at all like the terms of the bond in *Hilton v. Eckersley* ('). 679] In that case all the parties *agreed to be bound by any resolution that might be passed as to the mode of conducting their trade, even to the extent of suspending all their trading operations.

"In the present case nothing more is contemplated than an apportionment of work in the port of Melbourne between the contracting parties. Certain ships are allotted to each of them, and they merely stipulate that they will not compete with or encroach upon each other, but will confine themselves each to his own allotted ship. This it was contended was analogous to a contract between traders by which a district was allotted to each within which to vend his wares and into which the other should not intrude. We concur in that view."

Mr. *Bompas*, Q.C., and Mr. *J. D. Mayne*, for the appellant: Upon the evidence there was no proof that the plaintiff had selected Stewart & Couch in place of R. Towns & Co. in terms of the agreement and as alleged in the declaration; it was proved that Stewart & Couch had refused to allow the stevedoring of the *Clara* and *Eastern Monarch* to be done by the respondent, and had required the appellant to do the same within the meaning of the agreement; it was not proved that the respondent had sustained any damage by the acts of the appellant. If the verdict were not entered

(') 6 E. & B., 47; 24 L. J. (Q.B.), 353; 25 L. J. (Q.B.), 199.

for the appellant, it ought at least to have been reduced to £20.

The main points of law are, first, the agreement was void as being opposed to public policy, and entered into without any sufficient consideration to the defendant. It is in restraint of trade, and the public receive no equivalent advantage. An agreement amongst tradesmen that some of them shall supply certain persons and others shall not supply them is bad. Reference was made to the *Bridgewater Case* ⁽¹⁾; *Hilton v. Eckersley* ⁽²⁾; *Wallis v. Day* ⁽³⁾; *Malan v. May* ⁽⁴⁾; *Leather Cloth Company v. Lorrison* ⁽⁵⁾. This case is distinguishable from those cases in which two or more traders agree to divide the country into certain districts, and each to confine himself to his own allotted portion, and thereby lessen *the expenses of their trade [680 and so be able to sell at a less price. In such cases the agreement is for the benefit of the public: *Wickens v. Evans* ⁽⁶⁾. A general restraint of trade is bad, but a partial restraint is good if there be a countervailing advantage, or, at all events, no disadvantage to the public and consideration is given for it. [SIR MONTAGUE E. SMITH: The object of this agreement does not appear to have been illegal, but in carrying it out it is possible that there may have been some arrangement in illegal restraint of trade.]

Second, it was a condition precedent to bringing any action under the agreement that the matter in dispute should have been previously submitted to arbitration: see the negative words in the 11th clause. Reference was made to *Dawson v. Fitzgerald* ⁽⁷⁾; *Halfhide v. Fenning* ⁽⁸⁾; *Dimsdale v. Robertson* ⁽⁹⁾; *Scott v. Avery* ⁽¹⁰⁾; *Tredwen v. Holman* ⁽¹¹⁾; *Hemans v. Picciotto* ⁽¹²⁾; *Heaton v. Sayer* ⁽¹³⁾.

Mr. Westlake, Q.C. (Mr. Benjamin, Q.C., with him), for the respondent, after contending that upon the evidence the verdict and judgment were correct: The agreement was good in law and was made upon or imported a sufficient consideration. The effect of it was to distribute business without diminishing its volume, and therefore it was valid. There was no unreasonable restraint of trade, calculated to prejudice the public, or affording any unfair protection to

(1) 4 H. L. C., 1.

(2) 6 E. & B., 47; 24 L. J. (Q.B.), 353; 292; 1 Ex. D., 260; 17 Eng. R., 425.

25 L. J. (Q.B.), 199.

(3) 2 M. & W., 273, 280.

(4) 11 M. & W., 653.

(5) Law Rep., 9 Eq., 345, 353.

(6) 3 Y. & J., 318.

(7) Law Rep., 9 Ex., 7; 8 Eng. R.,

(8) 2 Bro. C. C., 336.

(9) 2 J. & L., 58.

(10) 5 H. L. C., 811.

(11) 1 H. & C., 72; 31 L. J. (Ex.), 398.

(12) 1 C. B. (N.S.), 646.

(13) 4 H. & N., 643.

the interests of the respondent. See *Ward v. Byrne* ⁽¹⁾; *Leighton v. Wales* ⁽²⁾; *Gale v. Reed* ⁽³⁾.

With regard to the arbitration clause it is a question of construction as to the precise moment when the breach is completed and the right of action ensues. Here the arbitration clause was distinct from the preceding clauses, and did not limit the right of action under them. If a man contracts to do or omit, otherwise to pay damages as awarded, there can be no breach before award: see *Scott v. Avery* ⁽⁴⁾. But 681] in this case the agreement to refer *was collateral and independent, and unless matters in difference have been actually submitted to arbitration, it was not intended that an award should be a condition precedent to the right to sue: see *Horton v. Syer* ⁽⁵⁾; *Edwards v. Aberayron Mutual Ship Insurance Society* ⁽⁶⁾; where it was held that the negative words employed in that case did not create a condition precedent, and Brett, L.J., declared that *Tredwen v. Holman* ⁽⁷⁾, relied upon on the other side, is not law.

Mr. Bompas, Q.C., replied.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH: The action in which this appeal has been brought arises out of a contract entered into between certain persons carrying on the business of stevedores in the port of Melbourne for regulating and distributing among them the stevedoring of ships in that port.

By the deed, which contains the agreement, the four parties to it, viz., the firm of George Washington Robbins and Francis Robbins Collins (the defendant in the action and the present appellant), Alfred John Johnson, and Locke (the plaintiff, and the respondent in this appeal), covenanted with each other, first, that "as between the parties" Messrs. Robbins should "be absolutely entitled to the business of stevedoring all ships which should arrive in the port of Melbourne consigned to the firm of Dalgety, Blackwood & Co.," and that each of the other parties (using the words above cited as to each) should be absolutely entitled to the business of stevedoring all ships which should arrive in the port consigned to certain other firms, viz., the defendant to those consigned to J. H. White & Co., Johnson to those consigned to MacFarlane & Co., and the plaintiff to those consigned to Holmes, White & Co., R. Towns & Co., and King, Meng & Co., and that the parties should be absolutely entitled for

⁽¹⁾ 5 M. & W., 561.

⁽²⁾ 3 M. & W., 545.

⁽³⁾ 8 East, 80.

⁽⁴⁾ 5 H. L. C., 547.

⁽⁵⁾ 4 H. & N., 643.

⁽⁶⁾ 1 Q. B. D., 563; 17 Eng. R., 205.

⁽⁷⁾ 1 H. & C., 72; 31 L. J. (Ex.), 398.

their own use to the profits arising from such stevedoring respectively. This first covenant concludes as follows:—

“And neither of them the said several parties hereto shall not (*sic*), *nor will, save as hereinafter expressly provided, undertake or be in any way concerned in or interfere in the stevedoring, either in whole or in part, of any ship or vessel consigned to any of the said persons or firms hereinbefore particularly mentioned otherwise than according to the provision in that behalf hereinbefore contained.”

The second and third clauses of the deed are in the following terms:

“2. That if any or either of the said firms hereinbefore named shall refuse to allow the stevedoring of any ship or ships consigned to them to be done by the party who, under the last preceding clause shall be entitled thereto, but shall require any other or others of the said parties hereto to do the stevedoring thereof, then and in such case such party so required shall and will give an equivalent to the person who shall lose the stevedoring of such ship or ships, such equivalent to be determined, in case of disagreement between the parties, by two disinterested persons, to be nominated by Mr. James Allison Crane, and an umpire to be named by such arbitrators, in case they disagree.

“3. That the stevedoring of all ships not consigned to any of the hereinbefore mentioned firms shall be taken and stevedored in the following order; that is to say, the first ship to arrive after the date hereof to be stevedored by the said John Kindlan Collins, the second by the said Francis Robbins, the third by the said George Washington Robbins, and the fourth by the said Alfred Joseph Johnson, and so on in such order during the continuance of these presents, it being expressly agreed that the said James Locke shall not be entitled to the stevedoring of any ships or vessels save those consigned to the said firms of Holmes, White & Co., R. Towns & Co., and King, Meng & Co.”

The above clauses disclose the object and nature of the contract, but questions arose on other clauses of the deed.

The fifth clause provides that if any of the firms mentioned in the first clause should cease to carry on business, or if the number of ships consigned to any of them should be materially diminished, a readjustment should be made of the distribution of the ships, and in case any firm should cease to carry on business, the party losing *such [683] firm should be entitled to make a selection of another firm in Melbourne, subject to arbitration in case of disagreement.

The 9th clause is a covenant for the payment of £1,000 as liquidated damages for the breach of any of the covenants, and the 10th contains a provision for the submission of disputes to arbitrators, the terms of which will be more fully referred to hereafter.

R. Towns & Co., one of the firms assigned to the plaintiff, was dissolved, and a new firm, Stewart, Couch & Co., succeeded to its business, and was selected by the plaintiff under the clause of the agreement above referred to.

The declaration, after setting out the deed, alleged three breaches. The first and second have been abandoned by the plaintiff's counsel, and the action is thus reduced to the last breach. The averments which precede that breach allege that the plaintiff had selected Stewart, Couch & Co., in the place of R. Towns & Co., that certain ships arrived in Melbourne consigned to Stewart, Couch & Co., and that although that firm did not refuse to allow the stevedoring of these ships to be done by the plaintiff, yet the defendant did the stevedoring of them, whereby the plaintiff lost the profit which would otherwise have accrued to him.

On the first plea nothing arises. The second denies the breaches. The third sets out the arbitration clause, and avers that no arbitrators had been appointed, nor award made. The fourth sets out the deed at length, and avers that there was no consideration for it, save as appears by the deed; the object of the plea being to raise the question that the deed was void as being in restraint of trade. The fifth denies that the plaintiff selected Stewart, Couch & Co. in place of R. Towns & Co.; and the last plea avers that the other parties to the deed did not agree to such selection.

The plaintiff demurred to the third and fourth pleas, and took issue on the others.

The particulars in the action mentioned three ships, the Jason, Clara, and Eastern Monarch, as having been stevedored by the defendant in breach of the agreement, but it has been admitted that the action is not maintainable in respect of the Jason.

The evidence given at the trial was short and meagre. 684] The *following are the facts appearing upon it, so far as they are material to the points remaining to be decided upon this appeal.

The Clara arrived at Melbourne consigned to Stewart, Couch & Co. No question arises upon the unloading, which was done by the plaintiff. The Clara then passed out of the hands of Stewart, Couch & Co. into those of Poole,

Picken & Co., who employed the defendant to stevedore her for the outward voyage, which he did.

The Eastern Monarch also arrived at Melbourne consigned to Stewart, Couch & Co. The defendant both loaded and unloaded her. Stewart, Couch & Co. had nothing to do with the stevedores. This ship also passed into the hands of other merchants, viz., Bright and J. H. White, who employed the defendant to load her. It does not appear who were the persons who employed him to unload the ship.

A verdict was found for the plaintiff, with the following damages: viz., £125 for the Clara, and £155 for the Eastern Monarch. A rule *nisi* was obtained to set aside the verdict and enter it for the defendant, on the ground that the third plea was proved, or to reduce the damages to £20, on the ground that under the terms of the agreement the plaintiff was only entitled to recover the profit of unloading the Eastern Monarch.

The other points referred to in the rule relate to the breaches which are now abandoned.

The Supreme Court, after argument, discharged the above rule, and has also given judgment for the plaintiff upon the demurrers to the third and fourth pleas.

There was really no issue in fact taken upon the third plea, and no verdict could properly be entered upon it. The question on it is raised by the demurrer.

The point as to the reduction of the damages depends upon what may be held to be the right construction of the agreement. It was contended on this point by the defendant that the agreement was confined to the work done for ships whilst in the hands of those who were the consignees on their arrival in the port; but this would not seem to have been the intention of the parties, to be gathered from the general tenor and the particular language of the agreement. The ships allotted to each of the parties are * "those [685 which shall arrive in the port of Melbourne consigned to particular firms." This language is apparently used to describe the class or set of ships to which each party is to be absolutely entitled until their next departure from the port.

The agreement, particularly with reference to clause 3, seems to be an attempt to make provision for distributing the stevedoring business of all ships arriving in the port amongst the parties to the deed, and one mode adopted for ascertaining the set or class of ships to which each is to be entitled is by reference to the firms to which ships are on arrival consigned. It is of course quite usual, and is shown

to be so by the evidence given in the case, that ships should be chartered or loaded by others than the original consignees; and if the defendant's construction of the agreement were correct, it would follow that the parties would have provided only for the unloading of ships upon which there is comparatively little profit, and would in many, if not in most cases, have left out of their agreement the larger and more profitable business of loading them with the outward cargoes.

Their Lordships, therefore, agree with the judges of the Supreme Court in the construction they have placed upon the agreement on this point, and think that so much of the rule as prayed for a reduction of damages was rightly discharged. They may, however, observe here that the plaintiff, who insists on the construction which enables him, if the action is otherwise maintainable, to retain the full amount of damages awarded by the jury, cannot escape from the effect of this construction upon the question of the validity of the agreement with reference to the objection that it is void as being in restraint of trade.

That question arises on the demurrer to the fourth plea.

The objects which this agreement has in view are to parcel out the stevedoring business of the port amongst the parties to it, and so to prevent competition, at least amongst themselves, and also, it may be, to keep up the price to be paid for the work. Their Lordships are not prepared to say that an agreement, having these objects, is invalid if carried into effect by proper means, that is, by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade.

686] *The questions for consideration appear to them upon the authorities to be, whether and how far the prohibitions of this deed, having regard to its objects, are reasonable.

The numerous cases which have been decided on this subject are collected in the notes to *Mitchel v. Reynolds* in the first volume of Smith's Leading Cases. It may be gathered from them that agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and they are made on good consideration, and are reasonable. The courts are not disposed to measure the adequacy of the consideration, if a real and *bona fide* consideration exists, and the modern decisions have mostly turned on the question of the reasonableness of the restraint in relation to the objects of the contract. It was said by

Lord Ellenborough, in delivering the judgment of the court in *Gale v. Reed* ⁽¹⁾, "The restraint on one side meant to be enforced should in reason be coextensive only with the benefits meant to be enjoyed on the other." He went on to say, "As the carrying the restraint further would be arbitrary and useless between the parties, a construction which would have that effect must be reluctantly resorted to," and for that reason a construction which would not have this effect was given to the particular agreement in that case.

In the case of *Horner v. Graves* ⁽²⁾, Tindal, C.J., in delivering the judgment of the court, said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either, it can only be oppressive, and, if oppressive, it is in the eye of the law unreasonable."

The law as to the reasonableness of the restraint in contracts of this kind was very fully considered in the judgment of the Court of Exchequer in the case of *Mallan and others v. May* ⁽³⁾. There by a deed under which the defendant became assistant to the *plaintiffs in their [687 business of surgeon dentists, he covenanted that he would not carry on that business in London, "or in any of the towns or places in England or Scotland where the plaintiffs might have been practising before the expiration of the defendant's service." The declaration contained two breaches; the first for practising in London, the second for practising in another place where the plaintiffs had practised. The court adopted the principle of the decision in *Horner v. Graves* ⁽²⁾, and holding the contract to be divisible, decided that the prohibition against practising in London was reasonable and good, but that the covenant against practising in other towns and places went beyond what the protection of any interests of the plaintiffs required, and was, therefore, an unreasonable restriction. The court accordingly gave judgment for the plaintiffs on the first breach, and for the defendant on the second. The principles on which this case was decided were upheld by the Exchequer Chamber in *Price v. Green* ⁽⁴⁾.

⁽¹⁾ 8 East, 86.

⁽²⁾ 7 Bing., 743.

⁽³⁾ 11 M. & W., 653.

⁽⁴⁾ 16 M. & W., 346.

! Applying the rule to be collected from the authorities, it appears to their Lordships that the provision contained in the second clause of the deed, viz., that if either of the named persons should refuse to allow the stevedoring of any ship to be done by the party entitled to it under the first clause, and should require one of the other parties to it, such party so required should give an equivalent to the party who lost the stevedoring, to be determined by arbitrators, is not unreasonable, since it provides in a fair and reasonable way for each party obtaining the benefit of the stevedoring of the ships to which by the contract he was to be entitled. Each party might in turn derive benefit from this clause, and one of the four firms would always get the profit of the ship stevedored, though the work might be done by another of them. As regards the merchant, also, he can have his ship stevedored by the party whom he may require to do it, at least there is no prohibition against his having it so done.

But the operation of the covenant at the end of the first clause, upon which the third breach in the action is founded, is productive of wholly different results. That covenant is only modified by clause 2 as regards the original consignees, 688] and therefore in *the case of ships passing out of the hands of the named firms to which they were consigned on arrival, and being chartered or loaded by other merchants (which is the present case), the effect of the covenant is, that as to such ships, if the merchants loading them should not choose to employ the party to the agreement who, as between themselves, was entitled to do the stevedoring, all the parties to the agreement are deprived of the work; in the words of Mr. Justice Fellows such ships are, "so to speak, tabooed to them all." The covenant in such cases restrains three of the four parties to the agreement from exercising their trade, without giving any profit or benefit to compensate for the restriction to either of the four, whilst the combination they have thus entered into is obviously detrimental to the public, by depriving the merchants of the power of employing any of these parties, who are probably the chief stevedores of the port, to load their ships, unless in each case they employ the one of the four to whom the ship, as between themselves, has been allotted, however great and well founded their objections may be to employ him. Such a restriction cannot be justified upon any of the grounds on which partial restraints of trade have been supported. It is entirely beyond anything the legiti-

mate interests of the parties required, and is utterly unprofitable and unnecessary, at least for any purpose that can be avowed.

Yet a construction of the clause producing the above-mentioned consequences is that on which the plaintiff insists, and on which he is compelled to rely to sustain his only remaining breach. He is not in a position to maintain his action upon the second clause of the agreement, because Stewart, Couch & Co. did not refuse to employ him to do the work, and even if he could have brought his case within that clause, he must have failed in this action, because, as was rightly held by the court below in dealing with the second breach, the action will not lie under clause 2 until the amount of the equivalent to be paid has been ascertained in the manner required by that clause.

The part of the agreement which is open to objection, though differing in its circumstances and in the degree of the restraint which it imposes on the freedom of trade, is not distinguishable in its nature from that which was held to be void in *Hilton v. *Eckersley* (1); whilst it cannot be justified on the ground upon which Mr. Justice Erle (who differed from the majority of the court) thought the contract in that case might be supported, viz., that it might be necessary for the protection of the lawful interests of the parties. The object of the contracting parties in that case was to protect their interests as masters against combinations of workmen by an agreement to conduct their works, or wholly or partially to suspend them for a time, as the majority should resolve; and the learned judge thought that this object justified the mutual restraint of trade which they imposed on each other.

Upon the construction, therefore, which the plaintiff has placed upon the covenant in question, and which upon the whole their Lordships are of opinion is correct, they think, for the reasons above stated, that it creates an unreasonable restraint upon the parties in their trade, and ought not to receive the aid of the courts to enforce it. They have already said that this objection does not apply to clause 2 of the deed, and they consequently think that judgment on the demurrer to the fourth plea should be entered for the defendant as to the first and third breaches, but for the plaintiff as to the second breach.

The remaining question is that raised by the demurrer to the third plea, though, after the opinion which their Lord-

(1) 6 E. & B., 47; Ibid, 67

ships have just expressed, the decision of it is only material as regards costs.

The question so raised is, whether the general arbitration clause (clause 11) affords an answer to the action, there having been no arbitration and no award under it.

Since the case of *Scott v. Avery*, in the House of Lords (¹), the contention that such a clause is bad as an attempt to oust the courts of jurisdiction may be passed by. The questions to be considered in the case of such clauses are, whether an arbitration or award is necessary before a complete cause of action arises, or is made a condition precedent to an action, or whether the agreement to refer disputes is a collateral and independent one. That question must be determined in each case by the construction of the particular contract, and the intention of the parties to be collected from its language. The provision in the second clause of this contract falls, as their Lordships have already said, within 690] *the first-mentioned category, because the equivalent to be given in lieu of the profit would not be payable until the amount of it had been ascertained in the manner prescribed. But the 11th clause, according to the intention to be collected from the whole deed, appears to them, though by no means with clearness, to be a collateral and independent agreement. It extends to all doubts, differences, and disputes which should arise touching the agreement, and stipulates that all matters in difference should be submitted to arbitrators.

The learned counsel for the defendant strongly relied on the part of the clause which is in these words,—“And the award of the arbitrators shall be conclusive, and any of the parties shall not be entitled to commence or maintain any action at law or suit in equity in respect of the matters so submitted as aforesaid, except for the amount or amounts by the said award determined to be paid by any one or more of the said parties to the other or others of them, or otherwise in accordance with the terms and conditions of the said award, as to the acts or deeds to be made, done, executed, and performed.”

This passage, no doubt, contains negative words, but there is ambiguity in the words “in respect of the matters so submitted as aforesaid,” as to whether they were meant to apply to all matters which were to be submitted to arbitrators under the clause, or to the matters which, after they arose, had been specifically submitted in the manner prescribed. Looking out of this clause, it is material to con-

(¹) 5 H. L. C., 811.

sider clause 9, which is as follows,—“That in case of any breach or non-performance by any of the parties hereto of any or either of the covenants or agreements hereinbefore contained, such party so committing such breach, or not performing such covenant or agreement, shall and will well and truly pay unto each of the other parties hereto respectively, their or his executors, administrators, or assigns, the sum of one thousand pounds, as and for liquidated damages for such breach or non-performance, but without prejudice nevertheless to the right of any of the said parties hereto to enforce the specific performance of the covenants and agreements hereinbefore contained, or any or either of them.”

It may be inferred from this clause that the parties *contemplated that an action might be brought for [691 these damages, and with reference to the proviso to the clause, that they intended to reserve the right to bring a suit for specific performance. Their Lordships are, therefore, disposed to think that the negative words in the arbitration clause were only intended to apply to matters actually submitted to arbitration. They will not, therefore, disturb the judgment of the court below on this point.

The other points mentioned by the appellant's counsel were disposed of during the argument.

In the result, their Lordships are of opinion that the rule *nisi*, so far as it prays to enter the verdict for the defendant on the first and second breaches, should be made absolute, and as to the rest should be discharged; that the judgment for the plaintiff on the demurrer to the third plea should be affirmed; and that the judgment for the plaintiff on the demurrer to the fourth plea should be reversed as to the 1st and 3d breaches, and judgment entered as to these breaches for the defendant, and they will humbly advise Her Majesty accordingly.

The appellant having succeeded only on the point of the partial invalidity of the agreement, in respect to which both parties are equally in fault, their Lordships will make no order as to the costs of this appeal.

Solicitor for the appellant: *H. T. Roberts.*

Solicitors for the respondent: *Clayton, Son & Fergus.*

See 20 Eng. Rep., 803 note; 11 Fed. Repr., 10 note; 3 McCrary, 143 note; *Morris Run, etc., v. Barclay, etc.*, 68 Penn. St. R., 173, deciding many principles, and an excellent case; 26 Alb. L. J., 284.

A covenant in absolute restraint of

trade is not to be implied from doubtful words: *Stull v. Westfall*, 25 Hun, 1.

When a business is sold, a stipulation is necessary to prevent the seller from carrying on the same occupation in that town; the mere purchase of the “good-will” will not compel

such result: *Porter v. Gorman*, 65 Geo., 11.

Though such good-will is in the nature of property, and transmissible by assignment or bequest: *Hegeman v. Hegeman*, 8 Daly, 1.

On the dissolution of a partnership between J. and T., amongst other terms of arrangement J. promised T. that he would not again start in the same business in the same place, but refused to sign any writing to that effect: Held, that J. had only bound himself by honor, and that T. could not protect himself from carrying out the other terms of the agreement for dissolution, by showing that J. had not carried out his honorary engagement: *Jennings v. Tivey*, 6 Wyatt, Webb & A'Beckett (Eq.), 162.

A restraint upon trade to be valid must be partial, the consideration adequate and not colorable, and the restriction reasonable: *Morris Run, etc., v. Barclay, etc.*, 68 Penn. St. R., 173.

A restraint upon trade or employment which is general, is void: *Morris Run, etc., v. Barclay, etc.*, 68 Penn. St. R., 173.

A good test is whether the restraint is such as only to afford a fair protection to the party in whose favor it is, and not so large as to interfere with the interests of the public: *Morris Run, etc., v. Barclay, etc.*, 68 Penn. St. R., 173.

An agreement not to exercise a trade or carry on business at a particular place, or within certain limits, made upon good consideration, is valid, if shown to be reasonable, and if the restraint upon the covenantor be not greater than is proper for the covenantee in the enjoyment of his trade or business.

Canada, Lower: *Findlay v. McWilliam*, 23 L. C. Jur., 148.

Connecticut: *Cook v. Johnson*, 47 Conn., 175.

Georgia: *Ellis v. Jones*, 56 Geo., 504.

Illinois: *Stewart v. Challecombe*, 11 Bradw., 379.

Iowa: *Hedge v. Lowe*, 47 Iowa, 137.

Massachusetts: *Roper v. Upton*, 125 Mass., 258.

Missouri: *Skrainka v. Scharringhausen*, 8 Mo. App. R., 522.

New Jersey: *Richardson v. Peacock*, 33 N. J. Eq., 597.

New York: *MacKinnon Pen Co. v. Fountain, etc.*, 48 N. Y. Super. Ct. R., 442; *Dethlefs v. Tamsen*, 7 Daly, 354.

Ohio: *Buckhart v. Buckhart*, 36 Ohio St., 261; *Morgan v. Perhamus, Id.*, 517.

Pennsylvania: *Carroll v. Hicke*, 10 Phila. R., 303.

Victoria: *Robertson v. English*, 4 Wyatt, Webb & A'Beckett (Law), 238; *McLeod v. Roberts*, 3 Vict. Rep. (Law), 145.

An agreement whereby one partner sells his interest in the business to his copartner and agrees to "retire altogether from business," should be construed so as to bind the party selling from engaging in business only so far as such business, or place of business, would injure the business of the party purchasing; and is not therefore void as being in restraint of trade: *Boardman v. Wheeler*, 15 N. Y. Weekly Dig., 325, mem. 27 Hun, 616.

S. and B., the owners of the entire capital stock of a certain manufacturing corporation and its patents, agreed to sell the business and patents to F., C. and C., and accept as part of the purchase price notes of the company, with an agreement by said purchasers that they would remain trustees of the company for a definite period of time, and would maintain in the company assets equal to all its liabilities, including said notes. As an inducement to this guaranty, the vendors covenanted that neither of them would engage in business in opposition to the company to which the patents were conveyed, so long as said purchasers should remain such trustees:

Held, that the covenant of the vendors was not against public policy and void, as being in undue restraint of trade.

Where one of said covenantors becomes the owner of most of all of the stock of another company, of which he is the manager and only acting officer, an injunction will go against said company in a proper case to restrain it from acts constituting a breach of said covenant.

It is a breach of said covenant for such last named company, in pursuance of a fraudulent advertising scheme, to give away with the goods sold by it an article similar, and by such company

advertised to be equal to that manufactured and sold by said first named company under its patents: MacKinnon Pen Co. v. Fountain Ink Co., 48 N. Y. Supr. Ct. R., 442, 10 W. Dig., 422.

Where a contract in restraint of trade embraces several distinct promises and is divisible in its nature, the illegality of one provision which is capable of being construed divisibly, will not necessarily make the entire contract null and void: Western Union v. Burlington, etc., 11 Fed. Repr., 1.

A contract is wholly void if covenants in restraint of trade, which are illegal as against public policy, enter into and form a part of the entire consideration, and both parties are in fault as to those covenants. A separation of the good consideration from that which is illegal will be attempted in those cases, only when the party seeking to enforce the contract is not the wrongdoer, or the denial of relief would benefit the guilty party at the expense of the innocent. It is an inflexible rule, that no remedy can be had in a court of justice on an illegal contract, where both parties are *in pari delicto*: Saratoga County Bank v. King, 44 N. Y., 87.

Before a covenant not to practice medicine "in the neighborhood" can be enforced in equity, evidence must be given to show the extent of the practice sold to plaintiff: McNutt v. McEwen, 10 Phila., 112.

A contract not to carry on a business within "a radius of ten miles of" a village, means within a radius of ten miles of the centre of such village: Cook v. Johnson, 47 Conn., 175.

It is not competent for a railroad company to grant to a telegraph company the exclusive right to establish lines of telegraphic communication along its right of way, such contracts being in restraint of trade and contrary to public policy: Western, etc., v. Burlington, etc., 11 Fed. Repr., 1, 3 McCrary, 130, 2 Col. Law Repr., 307.

What is not a violation of an agreement not to solicit customers on a certain milk route, to buy milk, or to injure a certain business: Stull v. Westfall, 25 Hun, 1.

Where by a written contract the defendant, a physician, sold his medical practice to the plaintiff and agreed not to "resettle" in the same town: Held, he was bound thereby not to again take

up his residence in such town for the practice of his profession, but that he might practice in that locality while residing elsewhere: Haldeman v. Simon-ton, 55 Iowa, 144.

An agreement not to sell milk in the town of C. is not violated by selling to another residing outside of C., at the farm of the first party outside of the town, merely with knowledge that the purchaser intends to retail the milk within the town: Smith v. Martin, 80 Ind., 260.

Where a land agent sold his business and the good-will thereof to another, with an agreement not to re-engage in the business in the same place for three years, held, that after the expiration of that time he was not debarred by the contract from soliciting the agency of the same lands he had in charge when the contract was made: Hanna v. Andrews, 50 Iowa, 462.

Where a party, under agreement not to carry on a specified business under color of another name, engages in a business which is within the spirit of the agreement, he will be restrained from continuing it. Where the answer fails to disclose the true character of the business so engaged in, whether it was, in fact, such as the defendant might carry on without breach of his covenant, or whether it was so only colorably, the injunction will not be dissolved upon the answer, but will be retained till final hearing: Richardson v. Peacock, 26 N. J. Eq., 40.

T. L. & Co., a manufacturing firm, sold to the S. M. Co. their factory and the good-will of their business, the latter being a large part of the consideration for the price paid, and gave them a bond that no member of their firm should engage in the same manufacture anywhere in this country for twenty-five years without the consent of the S. M. Co., reserving the right of being employed by other parties on a salary, provided they should not be interested nor their names used in the business. Six months afterwards a new company was organized for the purpose of carrying on the same manufacture in the same town, T., one of the firm of T. L. & Co., entering into their employment on a salary, superintending the construction of their factory, ordering their machinery, purchasing stock, and rendering various other services, in-

cluding the carrying on of a portion of their correspondence. The new company soon became competitors in business with the S. M. Co., who suffered damage by the loss of skilled workmen who left their employment for that of the new company, and by the loss of customers, who were induced by the new company to purchase their goods in preference to those of the S. M. Co.; but it did not appear that these results were attributable to any act of T. L. & Co. or of T., or that the S. M. Co. had suffered damage from anything that T. had done in the service of the new company: Held, on a bill brought by T. L. & Co. to foreclose a mortgage given to secure the price of the factory and business sold by them, that the S. M. Co. was not entitled to an allowance of damages for a breach of the bond: *Treat v. Shoninger Melodeon Co.*, 35 Conn., 549.

The sale of the "good-will" of a school involves no personal effort on the part of the vendor to influence the attendance of pupils. In an action to recover the balance of the purchase-money under such a sale, it was error to admit circulars of rival schools, which showed that the vendor was a principal therein, without having first shown that said circulars were issued with his knowledge: *McCord v. Williams*, 96 Penn. St. R., 78.

E., carrying on the trade or calling of a dealer in pictures and photographic business, sold out such business to W., and by the agreement covenanted "not to open or start a retail and photographic business of a similar character" in the city of Toronto for five years. By a subsequent agreement the first was modified, so as to allow E. to sell in any manner to persons residing out of Toronto, and to sell at retail in Toronto, on allowing W. a percentage on the prices realized.

W. filed a bill alleging that E. had, prior to such second agreement, sold goods in contravention of the first agreement, and had subsequently sold to a large amount, and prayed an account and payment of his percentage. The court being of opinion that such second agreement had been executed for a valuable consideration, granted the decree as asked, and directed the account to be taken by the master, although the answer professed to state

the actual amount of sales, and on the motion for decree, the answer had been read as evidence by the plaintiff: *Williamson v. Ewing*, 27 Grant (U. C.), 596.

In case of a breach of a contract in restraint of trade, the plaintiff is entitled to recover the actual damages sustained from the breach, and not the consideration paid: *Stewart v. Challacombe*, 11 Bradw. (Ills.), 379.

In an action by the purchaser of the good-will of a firm, for a breach of the contract of sale, the measure of damages is not the amount of improper solicitation of the customers of the old firm, irrespective of its effect upon the business of the purchaser. The damages should be measured by the injury sustained, and not by the ineffectual attempts to injure: *Burckhardt v. Burckhardt*, 36 Ohio St. R., 261.

The defendant agreed to serve the plaintiffs in their business of milkmen, and in case of any breach by him of the agreement entered into between the parties, and signed by them, that he would forfeit the sum of fifty dollars, to be recovered by the plaintiffs as stipulated damages, and not as a penalty: Held, that this did not enable the defendant, on payment of the \$50, to do the prohibited acts; and in a bill seeking to enforce the agreement, the plaintiffs prayed for payment of the amount of the liquidated damages, and for an injunction to restrain the defendant from acting in breach of his agreement. On the motion for an injunction coming on,—held, that plaintiffs were at liberty to waive their claim for damages, and elect to have relief by injunction: *Toronto, etc., v. Gowans*, 26 Grant's (U. C.) Chy., 290.

An injunction will be denied when it is asked not to restrain the doing of an act, but the doing of an act to the injury of the plaintiff; such injunction will be denied, because if the inconvenience of enforcing an injunction, for every alleged breach of which a trial must be had, in order to determine whether the act was or was not injurious to the plaintiff: *Stull v. Westfall*, 25 Hun, 1.

A combination is criminal when the act to be done necessarily tends to prejudice the public, or to oppress individuals by unjustly subjecting them to the power of the confederates. In

such unlawful combinations the gist of the offence is the conspiracy. If the motives of the confederates be to oppress, the means they use unlawful, or the consequences to others injurious, it is a conspiracy: *Morris Run, etc., v. Barclay, etc.*, 68 Penn. St. R., 173.

Every association to raise or depress the price of labor beyond what it would bring if left without aid or stimulus, is criminal. To fix a standard of prices among men of the same employment is not in itself criminal, but may become so if coercion, restraint, penalties or force of arms be resorted to. If the means be unlawful, the combination is indictable: *Morris Run, etc., v. Barclay, etc.*, 68 Penn. St. R., 173.

A "corner," whether to affect the prices of articles of commerce or the prices of vendible stocks, by confederation to raise or depress the price and operate on the markets, is a conspiracy: *Morris Run, etc., v. Barclay, etc.*, 68 Penn. St. R., 173.

A contract by which one party at his own lime kiln agrees to manufacture for another party, a certain number of barrels of lime within a given time, for which he is to receive a given sum per barrel, and which provides also that during the continuance of the agreement, the party manufacturing the lime shall not sell to any person any lime, is not illegal, as being in restraint of trade: *Schwalm v. Holmes*, 49 Cal., 665.

Where one producer of a commodity, for the purpose of enhancing the price, enters into a contract with another producer, binding the latter to withhold and keep out of the market his supply, the contract is against public policy and void: *Arnot v. Pittston, etc.*, 68 N. Y., 558.

Defendant and the B. C. Co. were corporations engaged in mining and selling coal at or near Pittston, Penn. Defendant also had a coal depot at Elmira, the chief market for coal in western New York, from whence was supplied a large extent of country north and west. For the purpose of monopolizing the trade and to maintain an unnaturally high price, the two companies entered into a contract, by which defendant agreed to take all the coal which the B. C. Co. should desire to send north of the State line, not exceeding 2,000 tons per month, at the

regular market price, less a commission of fifteen per cent., and the B. C. Co. agreed not to sell coal to any party other than defendant, to come north of the State line. The product of the B. C. Co. largely exceeded 2,000 tons per month. Defendant had made similar contracts with all the other mining proprietors. Of these, however, the B. C. Co. did not have actual notice. The B. C. Co. delivered coal and made advances under the contract during the first month, and then refused to carry it out further. In an action by plaintiff as assignee of the claim of the B. C. Co. under the contract, to recover the agreed price for the coal and the moneys advanced; held, that the contract was against public policy as in restraint of trade, and so void; that the agreement of the B. C. Co. not to sell to others, it knowing that the object of defendant was to create a monopoly, and that this was one of the means of averting competition, made it a party to the illegal scheme of defendant; that the legal and illegal stipulations in the contract were dependent and inseparable; and that a rescission or repudiation of the contract, after part performance, did not authorize a recovery for the partial performance *Arnot v. Pittston, etc.*, 68 N. Y. 558.

S. P., Morris Run, etc., v. Barclay, etc., 68 Penn. St. R., 173.

A contract entered into by the grain dealers of a town which, on its face, indicates that they have formed a partnership for the purpose of dealing in grain, but the true object of which is to form a secret combination, which would stifle all competition, and enable the parties, by secret and fraudulent means, to control the price of grain, costs of storage and expense of shipment at such town, is in restraint of trade and consequently void, on the ground of public policy: *Craft v. McCounoughy*, 79 Ills., 346.

While a vendor of goods may, under certain limitations, recover for their price, notwithstanding that he knew the vendee intended an improper use of them, so long as he did nothing to aid in such use, yet if he has done anything beyond making the sale to aid the illegal plan of the purchaser, he cannot recover: *Arnot v. Pittston, etc.*, 68 N. Y., 558.

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of several corporations, entering into an arrangement to put up the price of coal, to equalize prices in favor of one of the corporations, or another of them and accepted, cannot be recovered on against the latter. Such transaction is not an independent cause of action: *Morris Run, etc., v. Barclay, etc.*, 68 Penn. St. R., 173.

A note, etc., if but an instrument to execute an illegal contract, is tainted by the illegality, and cannot be recovered: *Morris Run, etc., v. Barclay, etc.*, 68 Penn. St. R., 173.

Where parties have entered into a contract in restraint of trade and there-

fore contrary to public policy, a court of equity will not lend its aid to require an account of profits and a division thereof, although the contract has been executed: *Craft v. McConoughy*, 79 Ills., 346.

Although a contract is invalid, yet property accumulated under it must, as between the parties, be disposed of according to equity, and the court will not refuse to deal with that property on the ground that it was acquired under an illegal contract: *Western Union, etc., v. Burlington, etc.*, 11 Fed. Repr., 1.

[4 Appeal Cases, 692.]

J.C.(*), July 10, 11, 12, 26, 1879.

[PRIVY COUNCIL.]

692] *ALTAMONT DE CORDOVA, JULIA DE CORDOVA, and ISAAC HENRY DE MERCADO, *Defendants*; and SOLOMON DE CORDOVA, *Petitioner*.

ON APPEAL FROM THE HIGH COURT OF CHANCERY, JAMAICA.

Compromise by Executors of Debt due by one of themselves—Fraud—Settlement in Account—Liability of Executors.

A. C., being one of several executors, a debtor to his testator's estate in the sum of £20,130, and entitled to one-sixth of the said estate (estimated at £6,000) as legatee under the will, agreed with his co-executors, in accordance with the terms of the will and without objection from the parties interested, to set off the said £6,000 against the like amount of the debt then payable by him, at the same time paying about £1,000 in cash. Thereafter having become insolvent, A. C. agreed, by way of compromise with his creditors, including the said executors, that they should accept 5s. in the pound in full of their demands, secretly arranging with some of the said creditors to pay to them further sums if he should be in a position so to do, and subsequently paying to them, or some of them, further sums. For the purposes of the compromise the debt due to the testator's estate was treated by the executors as amounting to £19,808, thus in effect reviving the debt of £6,000 which had been previously discharged, and accepting in respect of it a composition of 5s. in the pound; and the executors also treated as revived A. C.'s right to one-sixth of the testator's estate.

In a suit brought by a legatee against the executors, all of whom proved the will, *held*, that the above agreement of set-off extinguished A. C.'s debt *pro tanto*, and had the same effect as if A. C. had paid £6,000 in cash. It also extinguished A. C.'s right under the bequest, unless it should turn out that the one-sixth share exceeded the estimated £6,000, and subject to his liability to refund *pro tanto* in case the same should fall short of the estimated £6,000.

Held, also, that the agreement of compromise was a breach of trust and void as

(*) *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR JAMES HANNEN.

against the plaintiff, and that it was fraudulent as regards A. C. The secret arrangement, though not legally binding, was sufficient to vitiate the compromise.

Held, further, that whether or not a compromise by executors of a debt due from one of themselves will be excused and upheld if beneficial to the *estate, [693 the above compromise and the mode in which it was carried out as above were injurious to the estate and to the plaintiff, and that the plaintiff, in the absence of any consent or acquiescence by him, was not bound thereby.

Held, further, that A. C. was liable to the estate for the full amount of what would have been due and payable by him if the compromise had never been effected, and that the co-executors were severally liable for so much of the said amount as would or might at any time have come to their hands but for their wilful neglect and default.

It is not necessary to direct an inquiry previous to charging the defendants as for wilful neglect and default.

The executors having been directed by the will to sell the real estate, if they allowed one of their number to hold stores and buildings at less than a fair occupation rent, are chargeable with what would have been a fair occupation rent.

A house and premises having by the will been given to the widow for life without impeachment of waste, an inquiry was directed whether any charge for money expended thereon by the executors ought to be allowed or not, having regard to the circumstances under which the expenditure was made.

Interest on sums decreed allowed at 6 per cent.

APPEAL from a decree of the Vice-Chancellor of Jamaica (Sept. 3, 1877),

The facts of the case and the nature of the suit are sufficiently stated in the judgment of their Lordships.

The decree appealed from, *inter alia*, declared the will of Aaron de Cordova established, and ordered that the trusts thereof be carried into execution, and that the release hereinafter referred to and dated the 20th of January, 1868, from the appellants, as executors of the said Aaron de Cordova, to the appellant Altamont de Cordova, be set aside as against the respondent as a fraudulent breach of trust. It also declared that the appellants were severally liable and responsible to the estate of the testator as between themselves and the respondent for the full amount thereby proposed or intended to be abandoned and given up by them to Altamont with interest. It also declared that an alleged stated account, dated the 28th of February, 1870, between the appellants and respondent and signed by the latter, did not bind the respondent, and that the same should be opened. It also declared the appellants guilty of a devastavit in returning an inventory of their testator's personal estate at an undervalue, and in compromising the debt due by Altamont. And it directed *various accounts, the nature of [694 which, so far as they are material, appears in the judgment of their Lordships.

Mr. North, Q.C., and Mr. Solomon, for the appellants: The compromise of the 20th of January, 1868, was on the evidence entered into in good faith, and was beneficial to the

testator's estate. Under such circumstances, the executors could compromise the debt of one of them. See *Blue v. Marshall* ⁽¹⁾; *Pennington v. Healey* ⁽²⁾; *Forshaw v. Higginson* ⁽³⁾.

If the compromise cannot be supported, the appellants, or at least the appellants other than Altamont, cannot be held liable in respect of Altamont's debt for more than would have been recovered for the testator's estate if that compromise had not been made, and there is no evidence to show that more could have been recovered than was in fact recovered by the compromise. At the utmost, before charging the appellants other than Altamont, an inquiry should have been directed whether the whole or any part thereof could have been recovered; and had such inquiry been directed, the appellants would have been able to show that part of the debt certainly could not have been recovered. See *Mucklow v. Fuller* ⁽⁴⁾; *Tebbs v. Carpenter* ⁽⁵⁾ and two cases there cited; *Powell v. Evans* ⁽⁶⁾; *Lowson v. Copeland* ⁽⁷⁾; *Stiles v. Guy* ⁽⁸⁾; *Maitland v. Bateman* ⁽⁹⁾; *Edmonds v. Peake* ⁽¹⁰⁾; *East v. East* ⁽¹¹⁾; *Caney v. Bond* ⁽¹²⁾; *Clack v. Holland* ⁽¹³⁾; *Hobday v. Peters* ⁽¹⁴⁾; *Bullock v. Wheatly* ⁽¹⁵⁾; *Wiles v. Gresham* ⁽¹⁶⁾. *Coope v. Carter* ⁽¹⁷⁾ is an authority that at least one act of wilful neglect or default must be alleged and proved in order to obtain a decree directing an inquiry as to wilful neglect or default. With regard to the signed account of the 28th of February, 1870, 695] the *decree is erroneous in opening it. The same was on the evidence approved and signed by the respondent after mature consideration, and deliberately, with full knowledge of the circumstances. The respondent also acquiesced therein for upwards of six years, and did not by his pleadings refer to such account. The decree was also erroneous, as urged in the fifth ground of appeal, in declaring that the appellants were guilty of a devastavit in returning an inventory of their testator's estate at an undervalue. The inventory was founded upon valuations, and was made in manner prescribed by law; and if the facts are as the appellants allege, it was not at an undervalue. The decree

⁽¹⁾ 3 P. Wms., 381.

⁽²⁾ 1 C. & M., 402.

⁽³⁾ 8 De G., M. & G., 827.

⁽⁴⁾ Jac., 198.

⁽⁵⁾ 1 Madd., 290, 297.

⁽⁶⁾ 5 Ves., 843.

⁽⁷⁾ 2 Bro. C. C., 157.

⁽⁸⁾ 1 Mac. & G., 422; 4 Y. & C. (Ex.), 571; 16 Sim., 230.

⁽⁹⁾ 8 Jur., 896; S. C., 16 Sim., 233, n.

⁽¹⁰⁾ 7 Beav., 239.

⁽¹¹⁾ 5 Hare, 348.

⁽¹²⁾ 6 Beav., 486.

⁽¹³⁾ 19 Beav., 262, 271.

⁽¹⁴⁾ 28 Beav., 354.

⁽¹⁵⁾ 1 Coll., 130-136.

⁽¹⁶⁾ 2 Drew., 258; 5 De G., M. & G., 770.

⁽¹⁷⁾ 2 Dr G., M. & G., 292.

was also erroneous in ordering that the appellants be charged with a fair occupation rent of such stores and buildings belonging to the testator's estate as have since his death been occupied by Altamont. Neither of the other appellants have been in occupation thereof, or of any part thereof. Again, the appellants ought to be allowed moneys expended in repairs or improvement of house and premises devised by the testator to his widow for life. A tenant for life without impeachment of waste is not bound to repair, and therefore the appellants as executors and trustees were entitled and bound so to do: *Marquis of Lansdowne v. Marchioness of Lansdowne* (1); *Powys v. Blagrave* (2). The cases cited by the Vice-Chancellor, *Hibbert v. Cooke* (3); *Nairn v. Majoribanks* (4), and *Caldecott v. Brown* (5), are distinguishable. See *Dent v. Dent* (6). The rate of interest charged was excessive: *Robinson v. Robinson* (7).

Mr. Mackeson, Q.C., and Mr. Whitehorne, for the respondent: Upon the evidence the compromise and release of the 20th of January, 1868, is fraudulent and void, and a breach of trust, and should be set aside: see as to the effect of the secret arrangement *Mare v. Sandford* (8); *Wood v. Barker* (9); *M'Even v. Sanderson* (10). The appellant Altamont is therefore liable to pay the whole of the debt due by him to the testator's estate. As regards the appellant and his co-executors, they committed a devastavit in not [696 getting in the debt due by Altamont, and are therefore severally liable to make good the amount thereof. Upon the evidence, it appeared that Altamont's debt could have been recovered by his co-executors if they had taken proper measures to call it in. Further, the appellants, having allowed Altamont to retain his one-sixth share of the testator's estate, estimated on the footing that the whole of his debt to the estate was a good asset, were precluded from entering into an arrangement with him whereby they accept 5s. in the pound in full discharge of his debt. As regards wilful neglect and default, an immediate decree may be made for an account on that footing without alleging and proving any single case. If executors are passive, that may amount to *crassa negligentia*. In every one of the cases cited on the other side the executor was insolvent; there was no fraud, no acts of commission, and yet no inquiry was directed. The *onus* is not on the plaintiff to show that

(1) 1 Jac. & W., 522.

(2) 4 De G., M. & G., 448.

(3) 1 S. & S., 552.

(4) 3 Russ., 582.

(5) 2 Hare, 144.

(6) 30 Beav., 363.

(7) 1 De G., M. & G., 247.

(8) 1 Giff., 288.

(9) Law Rep., 1 Eq., 139.

(10) Law Rep., 20 Eq., 65.

the money could have been got in; it is on the executor to show that it could not: see *Grove v. Price* (¹); *Wiles v. Gresham* (²); *Jevon v. Bush* (³); *East v. East* (⁴); *Ratcliffe v. Winch* (⁵); *Caney v. Bond* (⁶); *Candler v. Tillet* (⁷); *Jones v. Morrall* (⁸); *Massey v. Massey* (⁹). Even if one executor can release the debt of another, still, where executors have appropriated a legacy to the legatee, they cease to be executors, and have become trustees thereof, and then one trustee cannot release the debt of another: *Phillipo v. Munnings* (¹⁰); *Charlton v. Earl of Durham* (¹¹); *Dix v. Burford* (¹²). Further, the appellants committed a devastavit in undervaluing the testator's estate in the inventory returned by them to the office of the Secretary of Jamaica, and in particular in valuing the debts due to the testator at £12,549, when there was due from Altamont £20,130, and from Michael de Cordova £3,478.

The signed account of the 28th of February, 1870, was not, on the evidence, binding upon the respondent as a settled 697] account, *nor was there any proof of implied acquiescence: see *Sleight v. Lawson* (¹³); *Stackhouse v. Barnston* (¹⁴). With regard to the breach of trust in paying money out of the trust estate for the repairs of the house left to the widow for life, there is a distinction between repairs and improvements, and no case has sanctioned the application of capital moneys to the former: see Lewin on Trusts [7th ed.], 503, 5; *In re Leigh's Estate* (¹⁵); *Vyse v. Foster* (¹⁶).

Mr. North, Q.C., replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK: This is an appeal from a decree of the Vice-Chancellor of Jamaica, in a suit instituted by the respondent as a legatee under the will of his father, Aaron de Cordova, deceased, against the appellants, who were the executors and executrix of the testator.

To prevent confusion, the respondent in the appeal will hereinafter be called the plaintiff, and the appellants the defendants.

The will was dated the 10th of July, 1865, and the pur-

(¹) 26 Beav., 103.

(²) 5 De G., M. & G., 770.

(³) 1 Vern., 342.

(⁴) 5 Hare, 348.

(⁵) 17 Beav., 217.

(⁶) 6 Beav., 486.

(⁷) 22 Beav., 263.

(⁸) 2 Sim., N. S., 249.

(⁹) 2 J. & H., 734.

(¹⁰) 2 My. & Cr., 315.

(¹¹) Law Rep., 4 Ch., 433.

(¹²) 19 Beav., 409.

(¹³) 3 K. & J., 292.

(¹⁴) 10 Ves., 466.

(¹⁵) Law Rep., 6 Ch., 887.

(¹⁶) Law Rep., 8 Ch., 309; 4 Eng. R., 904; 7 H. L., 318; 4 Eng. R., 1.

port of it is fully set forth in the careful and elaborate judgment of the learned Vice-Chancellor.

It is sufficient to state here that the testator, after directing payment of his debts and funeral expenses, and amongst other legacies one-sixth part or share of all his estate to his son Altamont, and £200 to his son Solomon, the plaintiff, gave and devised all the rest, residue, and remainder of his estate, both real, personal, and mixed, unto and to the use of his executors and executrix, upon trust as to his house in Duke Street, in the city of Kingston, and all the furniture, &c., therein, to permit and suffer his wife to use, occupy, possess, and enjoy the same, or to receive and take the rents, issues, and profits thereof during the term of her natural life, without any impeachment of waste, and immediately upon the death of his said wife, to sell the same in such manner as his said executors, or the survivors or survivor of them, or the heirs of such survivor should think fit.

*The will then proceeds,—“And as to all the rest [698 of my said trust estate, to sell and dispose of, and convert into money as speedily as possible, so much thereof as shall be in its nature salable, and to collect, get in, and receive the residue thereof. And to stand and be possessed of all moneys hereinafter referred to as trust moneys, to arise from all such sales, disposals, conversions, collections, and receipts of my said trust estate. Upon trust as to so much thereof, and such sum as shall, together with the said sum of £200 bequeathed to my son Solomon, and such sum as shall appear by my books of account to be due to me by him (notwithstanding that such lastmentioned sum, or any part thereof, shall have been discharged and satisfied by operation of law) amount to an equal one-sixth part or share of and in all my estate, to lay out and invest the same in the names or name of my said executors and executrix, or of the survivors or survivor of them, or of the heirs, executors, or administrators of such survivor, in some one or more of the public stocks or funds of Great Britain, or this island, or at interest upon government or real securities in Great Britain or this island, and to stand and be possessed of and interested in such stocks, funds, and securities, and the interest, dividends, and annual produce thereof upon trust thereout, so long as the same shall last, to pay unto my said son Solomon yearly the sum of £240 by twelve even and equal monthly payments, the first payment to be made one month after my death, and immediately after the death of my said son Solomon to transfer and deliver the said stocks, funds, and securities, or so much thereof as shall then be existing and

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remaining unconsumed by such yearly payments as aforesaid, unto the widow and children (if any) of my said son Solomon; but if he shall leave no widow or child him surviving, then to hold the residue of the said stocks, funds, and securities (if any) upon the same and the like trusts as hereinafter expressed and declared of and concerning the balance of the said trust moneys."

The said will then declared trusts of the balance of the trust moneys for the benefit of the widow and four younger children of the testator, and then proceeded as follows:

"I declare and direct that any legatee or executor named in this my will, who shall at the time of my decease owe me 699] any *money, shall account for the same to my executors and executrix."

The testator died on the 8th of July, 1866. He had been twice married, and left two sons by his first wife, viz., the plaintiff, who was his eldest son, and the defendant Altamont. His second wife, Julia De Cordova, one of the defendants, who was appointed executrix of his will, survived him. He also left by his said second wife, two sons, Alfred and Eustace, and two daughters, Ella and Fleurette.

Prior to the year 1863 the defendant Altamont carried on business in partnership with his father the testator, who in that year retired and sold his share in the business to his son Altamont for a sum of which £17,716 odd remained unpaid at the time of the death of the testator. That amount was secured by six promissory notes of the defendant Altamont, dated the 3d of August, 1863, for the respective amounts following, that is to say:

One for £5,000, due on the 10th of August, 1866.

One for £2,500, due on the 10th of August, 1867.

One for £2,500, due on the 10th of August, 1868.

One for £2,500, due on the 10th of August, 1869.

One for £2,500, due on the 10th of August, 1870.

And one for £2,716 3s. due on the 10th of August, 1871.

Each of the notes bore interest at 6 per cent., from the 1st of August, 1864, payable yearly. In addition to the said promissory notes and a balance of interest amounting to about £1,000 due thereon, Altamont was indebted to the testator, at the time of his death, in a sum of £2,414 1s. 5d., on open account, making a total, exclusive of interest, of £20,130 odd.

The plaintiff was, at the testator's death, indebted to him in a sum of £1,968 7s. 8d.

The testator's other assets consisted of debts due to him, including a debt from one Michael De Cordova, the house and

furniture and effects specifically given by the will, and other real estate, and certain investments, some of which were on foreign securities.

All the defendants proved the will, and thereby took upon themselves the execution thereof.

Shortly after the death of the testator, the defendants prepared a balance sheet of the estate. The net assets, including the debt *from Altamont, were estimated at [700 £36,000. Altamont claimed to set off one-sixth of that amount bequeathed to him by his father's will against the amount due on the promissory note which matured on the 10th of August, 1866, and the sum owing from him on open account. His co-executor, the defendant, De Mercado, opposed this claim at first, but discontinued his opposition upon being advised that the claim was well founded. A settlement was accordingly concluded by which it was arranged that the legacy, estimated at £6,000, should be set off against the like amount of the debt then payable by Altamont.

That settlement, in their Lordships' opinion, extinguished, to the extent of £6,000, Altamont's debt, and also any right which he had under the bequest in his father's will, unless it should turn out that the assets exceeded the amount at which they were then estimated. He was also liable to refund *pro tanto* in case the assets should fall short of the amount at which they were estimated, and according to which his share of the property under his father's will was treated as amounting to £6,000, the sum allowed in the settlement on account. It was said in the argument of the learned counsel for the defendants that the settlement in account was a mere paper transaction, but a paper transaction of this nature is merely a representation on paper of that which is treated by the parties as having actually taken place. By setting off one debt against another of equal amount both are extinguished. A settlement of a debt in account amounts to the same thing as a payment: *Skyring v. Greenwood* (1), and *Bramston v. Robbins* (2). Their Lordships consider that the settlement in account had the same effect as if Altamont had paid £6,000 of the debt then due and payable by him to the estate, and the defendants, as executors, had with the assets so received paid him the then estimated amount of his legacy, subject to his liability to refund *pro tanto* in case the assets should fall short of the estimated amount.

Neither of the parties have contended by their counsel before their Lordships that the settlement in account was

(1) 4 B. & C., 281.

(2) 4 Bing., 13.

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not in accordance with the testator's will, by which he declared that any legatee who should owe him any money should account for the same with his executors. Their 701] Lordships are of opinion that it was binding *upon Altamont, and also upon his co-executors, who assented to it, and the plaintiff has not objected to it. If the settlement did not amount to a discharge in full of the £6,000 of the debt then payable, the executors would be liable for allowing that portion of the debt to remain outstanding from the time of the death of the testator in 1866, when Altamont was solvent, up to the date of the compromise in 1868, when he is said to have been insolvent. According to Altamont's own evidence he was solvent at the time of his father's death. His liabilities to the estate were estimated by the executors as of the value of 20s. in the pound, and his legacy was calculated and allowed upon that basis. Further, in a conversation which Altamont had with his brother, the plaintiff, before the latter left for America, he said, "You can go away making your mind perfectly easy, for if you live for ninety-nine years your money is safe, and you will always receive your twenty pounds a month." It appears that, in addition to the £6,000 of Altamont's debt discharged by the settlement, Altamont paid to the estate in cash about £1,000 on account. Other evidence puts the amount paid at about £916, but the difference is not a matter of importance.

This brings their Lordships to the consideration of the effect of the compromise which took place in January, 1868.

It appears from the evidence of Altamont that in the course of the year 1867 he sustained heavy losses in his business, and by reason thereof became embarrassed in his circumstances and unable to meet his engagements. In the month of August, 1867, the appellant De Mercado made frequent applications to him to pay the £2,500 due on the promissory note which became payable in that month, but such applications were unsuccessful. On the 20th of January, 1868, an arrangement was made between the appellant, Altamont, and his principal creditors, including himself and the other defendants as executors and executrix of his father's will, which was embodied in a letter addressed to his firm of Altamont De Cordova & Co. The letter was in the following terms:

"Kingston, Jamaica, 20th January, 1868.

"Messrs. Altamont De Cordova & Co.,

702] "Dear Sirs,—Having investigated your statement and account *in connection with your business, we have

to express ourselves satisfied as to the fact that the unfortunate result has been brought about by serious losses which accrued during the recent panic, and we hereby agree to accept as a compromise in full of our demands the sum of five shillings in the pound, payable by your acceptances at three and six months, and a transfer of the debt of Mr. W. Knaggs in trust for our benefit. It being understood that this arrangement on our part shall only hold good in the event of all your creditors, to whom your matters have been submitted, according to the arrangement, namely,

“Colonial Bank.

“Executors of the estate of Aaron De Cordova.

“Charles Levy & Co.

“Davidson, Coulthurst & Co.

“Nunes Bros.

“Alberga Brothers & Sons.

“Lewis Leon, London, and

“Henry De Cordova & Co., New York.

“We further consent to your proposition that you pay all your other small creditors in full, and agree to sign a more formal document to the same effect at any time we may be called upon so to do.”

The letter was duly signed by or on behalf of all the creditors mentioned therein, and it is admitted by the defendants that it was signed by all of them as executors of the testator.

The principal question to be determined in the present appeal is, was that compromise valid and binding upon the plaintiff. The other legatees in the will do not object to it.

The learned Vice-Chancellor has declared and decreed that it was a breach of trust and void as against the plaintiff.

Their Lordships are of opinion that that portion of the decree is correct, and that it must be upheld.

It was admitted by the learned counsel for the defendants that he could not refer to any decision that executors can compromise a debt due from one of themselves.

The case of *Cooke v. Collingridge* (¹), cited by the Vice-Chancellor, *seems to be decisive upon the question [703 that an executor cannot compromise a debt due from himself to the estate.

In that case Lord Eldon, in the passage quoted by the Vice-Chancellor, said,—“One of the most firmly established rules is that persons dealing as trustees and executors must put their own interests entirely out of the question, and this

(¹) 1 Jac., 607.

is so difficult in a transaction in which they are dealing with themselves that the court *will not inquire whether it has been done or not, but at once say that such a transaction cannot stand.*" It is treated as a breach of trust without inquiring whether the transaction was beneficial or not. The other case of *Ex parte Lacey* (¹), cited by the Vice-Chancellor is also in point. It is unnecessary to consider whether the doctrine is applicable to a case in which several executors compromise a debt due from one of them, or how far such a compromise if beneficial to the estate will be excused and upheld by the court, inasmuch as the learned counsel for the plaintiff was content to rest his case upon the ground that the compromise was not beneficial to the estate.

Their Lordships are of opinion that this view of the case is correct.

It has already been shown that £6,000 of the debt due at the time of the testator's death had, prior to the compromise, been extinguished by setting off the estimated amount of Altamont's legacy, and that a portion of the balance then payable was discharged by actual payment at the rate of 20s. in the pound. Altamont according to that transaction, was allowed in account £6,000, the full amount of his legacy, subject to his liability to refund if his one-sixth of the estate should eventually turn out to be less than £6,000.

He had, therefore, as the Vice-Chancellor properly remarked, "nothing further to receive from the estate, and the whole of the residue was trust property liable to be accounted for by himself and his co-executors." But when the compromise was entered into the settlement in account was ignored and abandoned. The debt due to the estate, upon which 5s. in the pound was to be accepted, was treated as amounting to £19,808 17s. 10d., in respect of which 704] ceptances for the composition of 5s. in the *pound amounting to £4,952 and a fraction were given by the defendant Altamont; two of such acceptances, for sums amounting together to £2,476 and a fraction, were at ninety days, and the other for £2,476 and a fraction at six months date.

Thus the debt of £6,000 which, in effect, had been discharged by the settlement at the rate of 20s. in the pound was revived, and a composition of 5s. in the pound accepted in respect of it, payable by bills half at three months and half at six months date; and, further, Altamont's right to the legacy of one sixth of the estate which had been satisfied

(¹) 6 Ves., 625.

in settlement of account was revived, and from the time at which the compromise was entered into the defendants have divided the net assets of the estate into equal sixth parts and taken credit in their account with the estate for one of those parts, amounting to £1,817 14s. 1d., and interest thereon amounting to £300, the two sums amounting together to £2,117, as due to Altamont on account of his legacy, and for payments made to him on that account, instead of charging him with the amount which he was liable to refund in consequence of the amount of assets actually received having fallen short of the amount at which they were estimated at the time when the settlement in account was concluded. There can be no doubt that the compromise and the mode in which it was carried out was highly beneficial to Altamont and injurious to the estate and to the plaintiff.

But, further, as regards Altamont, there was actual fraud in the transaction, for he admits that at the time when the compromise was entered into there was an understanding with the bank that if he should be in a position he was to make further payments, but he adds, "I was not to be legally responsible." The understanding with the bank does not appear to have been made known to the other creditors who signed, nor does the fact appear to have been communicated even to his co-executors, and certainly not to the plaintiff. The stipulation that he was not to be legally responsible did not render the secret understanding the less fraudulent, for it could not have been enforced even if the stipulation had not been made. The understanding was, however, acted upon, for it is proved that Altamont afterwards paid £2,300 to the bank in addition to the composition of 5s. in the pound.

*Altamont, on his cross-examination, said, "Not- [705 withstanding the compromise, I have paid Alberga Bros. since the full amount of their debt. I have also paid the Colonial Bank about £2,500 in addition. I think there was a small sum due in cash to Charles Levy & Co., not included in the compromise, that was paid in full. The debt included in the compromise was between £3,000 and £4,000. I have paid Leon since £1,000. I have paid H. De Cordova & Co. some £600 or £800 more by allowing them half commissions. The small debts were not included in the compromise and were paid in full. The transactions with the creditors were kept as secret as the compromise. Albergas was an accommodation, and I repaid him by payments from

time to time. They are the same Albergas that I have lent money to out of the estate."

It is unnecessary to say, although there are strong grounds for inferring, that all the additional payments were made in consequence of secret understandings with the creditors respectively prior to their signing the compromise. The understanding, as it is called, with the bank, was sufficient to vitiate the compromise.

The defendant De Mercado in his evidence said, "By the statement of his (meaning Altamont's) affairs made up to 31st December, 1867, which he showed to his creditors, I discovered that if I had pressed in the previous August bankruptcy must have been the result. In January, 1868, I accepted a compromise with him. If I had not compromised, the creditors would have thrown the estate into bankruptcy, and I believe they would not have got half the money that was offered. I took legal advice as to my power to compromise with him. I satisfied myself that, in accepting the compromise, I was acting for the best interest of the estate. I accepted the same compromise for my commercial debt of £3,700. There was a cash debt of about £500 which I refused to compromise, as I thought he was bound in honor to pay me that. I was afterwards paid that £500 in full. That was cash lent to be returned when I wanted it. It was repaid between 1868 and 1869 by small payments of £50."

Notwithstanding all the above-mentioned payments to others, the plaintiff was never informed of them, and nothing in addition to the 5s. in the pound was ever paid in respect of the debt due to the testator's estate. So far from 706] it, Altamont, in his letter to the *plaintiff of the 18th of April, 1870, says, "If I were worth £1,000,000 the executors could never compel me to pay one shilling, because they, *in common with my other creditors*, gave me a discharge on my paying 5s. in the pound."

The large payments which were subsequently made to other creditors, in excess of the 5s. in the pound which they had openly and ostensibly agreed to accept, have a very strong bearing upon the question whether the composition was beneficial to the estate of which the defendants were executors, and whether, if the composition had not been accepted, the payment of a larger amount might not have been enforced against the estate of Altamont, even if the creditors had thrown his estate into bankruptcy, as the defendant De Mercado says they would have done.

In addition to the circumstance that the plaintiff was

never informed of the secret understanding with the bank, and of the fact that many of the creditors were actually paid more than the amount agreed upon by the compromise, he was all along kept in ignorance of the settlement in account, by which Altamont's legacy of one-sixth of the estate had been extinguished and discharged, and of the fact that, upon the compromise, that settlement had been abandoned, and Altamont let in to share with the other legatees in the assets of the estate, and freed from his obligation to refund.

It is impossible to hold that the plaintiff could under the above circumstances be bound by any assent to, or acquiescence in, the compromise, if he ever did assent to or acquiesce in the same. The plaintiff, after he had been informed of the compromise by the letters of the 21st of January, 1868, from the executors and from his brother respectively, did say, in his letter of the 12th of February, "I must submit cheerfully to the reduction of my income;" but it is very doubtful whether that assent did not merely refer to the reduction in the allowance of from £20 to £10 a month mentioned in the letters of the 21st of January, 1878, without entering into the consideration of the particular circumstances under which that reduction had become necessary. The statements in the letters from the executors were little calculated to prepare the plaintiff for the announcement in the letter of the 26th of February, 1870, by which he was informed that his stipend must altogether cease after the 31st of December then next, as *he was then indebted to [707 his father's estate in the sum of £965 odd.

It is unnecessary to pursue this part of the case further, as their Lordships concur with the learned Vice-Chancellor in holding that the composition was null and void as against the plaintiff, and that he is not bound by any assent to or acquiescence in the same.

This brings their Lordships to consider whether any and what variations ought to be made in the decree under appeal.

The decree declares that the executors are all severally liable to the estate as between themselves and the plaintiff for the full amount proposed or intended to be abandoned by the compromise and given up by them to Altamont, with interest. The compromise being void as against the plaintiff, there can be no doubt that that portion of the decree ought not to be varied so far as it relates to Altamont.

Their Lordships have had some doubts whether it ought to be varied as regards the defendant De Mercado. In this respect the case of the defendant Julia De Cordova is very different from that of the defendant De Mercado, who, when

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he, as one of the executors, agreed to the composition, stipulated for a private benefit to himself. Although their Lordships, looking to the payments made by Altamont to the bank and other creditors, are of opinion that a larger amount than 5s. in the pound could have been obtained if the defendants had not agreed to accept the composition, they are not prepared to hold, that even with the utmost diligence, the full amount of 20s. in the pound could have been realized; and they therefore think that although the defendants Julia De Cordova and Isaac Henry De Mercado, by reason of their having signed the composition and acted upon it, are liable to be charged for wilful neglect and default, it will be proper and equitable instead of charging them with the whole of the 15s. in the pound given up, to charge them only with what, but for their wilful neglect and default, they might have received of the debt due from Altamont. The amount should be the subject for further inquiry. As to other objections to the decree, their Lordships are of opinion that it was not necessary to direct an inquiry previously to charging the defendants, Julia De Cordova 708] *and Isaac Henry De Mercado, with what, but for their wilful neglect and default, they might have received; and that as regards the account signed by the plaintiff and acknowledged to be correct, and the delay in commencing the suit, the defendants are not in a position to contend that the plaintiff is thereby barred from obtaining the relief which he seeks, considering the ignorance of the real state of facts in which he was kept by them, to say nothing of the poverty to which he had been reduced, and his want of means either to obtain legal advice or to take legal proceedings.

As to the 5th reason for appeal stated in the appellant's case. The decree does not declare that the return of the inventory at an undervalue was of itself a devastavit, but that the defendants were guilty of a devastavit in returning the inventory at an undervalue and in subsequently compromising the debt. The compromise was a devastavit, whether the estate was undervalued in the inventory or not. In the inventory the debt of Altamont was valued at 50 per cent. of the amount; it was compromised for 25 per cent. It seems, however, to be premature to declare that the estate was undervalued in the inventory, and their Lordships are of opinion that the declaration to that effect in the decree should be omitted, so as to leave the whole question open before the Registrar.

As to the 6th ground of objection. The defendants were directed to sell the real estate. If they allowed Altamont to

hold the stores and buildings at less than a fair occupation rent, they are chargeable with what would have been a fair occupation rent. There is, therefore, no objection to the 7th of the accounts and inquiries by the decree directed to be taken by the Registrar, or to the order that the defendants be charged in their accounts (for that is the meaning of the order) with what shall be found to be a fair occupation rent.

It was objected to the 9th head of accounts and inquiries in the decree that the defendants ought not to have been charged with interest at 6 per cent. per annum, or at any higher rate than 4 per cent. per annum, on the amounts which upon inquiry it should appear ought to have been invested, and, further, that it was premature to fix the rate of interest. The case of *Robinson v. *Robinson* (1) [709] was cited in support of the objection as to the rate of interest. Their Lordships are of opinion that that authority does not support the objection, and that it ought to be disallowed.

It was objected that the decree was erroneous in ordering that in taking the accounts no credit is to be allowed to the defendants in respect of any moneys expended in or about the repairs of the house and premises in Duke Street, devised to the defendant Julia De Cordova for life. It appears to their Lordships that, as the house and premises were given to the widow for life without impeachment of waste, there may be circumstances under which the executors might have been justified in expending money to prevent the destruction or depreciation of the property. The decree ought to be amended by omitting the direction that no credit ought to be allowed for repairs. It will then be a matter for inquiry by the Registrar in taking the accounts whether any charge for money expended on the buildings which may be brought in by the defendants ought to be allowed or not, having regard to the circumstances under which the expenditure was made.

Lastly, it was contended that, even if the compromise was void, the question of costs ought to have been reserved, but their Lordships are of opinion that there is no foundation for that objection.

Upon the whole, their Lordships will humbly advise Her Majesty that the decree be varied by omitting that part of it by which it is ordered and decreed that the said Altamont De Cordova, Julia De Cordova and Isaac Henry De Mercado are severally liable and responsible to the estate of the said Aaron De Cordova, as between themselves and the plaintiff,

(1) 1 De G. M. & G., 247.

for the full amount proposed or intended to be abandoned and given up by them to the said Altamont De Cordova by the composition or alleged release of the 20th of January, 1868, in the pleadings mentioned, with interest ; and that in lieu thereof it be ordered, declared, and decreed that the said Altamont De Cordova is liable and responsible to the estate of the said Aaron De Cordova for the full amount of what would have been due and payable by him if that release or composition had not been made, with interest thereon at the rate of 6 per cent. per annum on that amount, and that the defendants, Isaac Henry De Mercado and Julia De 710] Cordova, are severally and respectively liable *and responsible for so much of the said amount as would or might at any time have come to the hands of the defendants, as executors and executrix of the said Aaron De Cordova, or to the hands of some or one of them, but for the wrongful and wilful acts, neglect, or default of the said defendants, Isaac Henry De Mercado and Julia De Cordova respectively, and that they are severally and respectively liable to interest at the rate of 6 per cent. per annum on the amounts, if any, to which they may severally be found to be liable. Further, that so much of the said decree as declares that the defendants returned an inventory of their testator's personal estate at an undervalue, and also so much thereof as directs that, in taking the accounts of the defendants with their testator's estate, no credit is to be allowed them for or in respect of any moneys expended in or about the house in Duke Street, devised to the defendant Julia De Cordova for life, be reversed, and that the said decree, except so far as it is hereby ordered to be varied or reversed, be affirmed.

The decree has been affirmed upon the main point, viz., the invalidity of the composition, and it remains substantially undisturbed as regards the appellant Altamont. Their Lordships are therefore of opinion that the appellant Altamont ought to pay, and their Lordships order that he do pay, the costs of this appeal. As regards the other two appellants, the decree has been varied in a material point. They, however, joined with Altamont in the appeal, and endeavored to support the composition. Under these circumstances, their Lordships are of opinion that the appellants, Julia De Cordova and Isaac Henry De Mercado, ought not to receive or pay any costs of this appeal. They will, therefore, respectively bear their own costs thereof.

Solicitors for appellants : *Tamplin, Taylor & Joseph.*

Solicitors for respondent : *Valpy, Chaplin & Peckham.*

See 25 Eng. R., 506 note; 12 Cent. L. J., 484.

The office and duties of a trustee cannot be delegated by him, unless there is either an express authority for that purpose conferred on him by the instrument creating the trust, or a consent to such delegation given by all parties interested in the trust.

Missouri: *Spurlock v. Sproule*, 72 Mo., 503.

New York: *Savage v. Gould*, 60 How., 234.

Victoria: *Levy v. Farrell*, 1 Wy. & Webb (Eq.), 10.

Wisconsin: *Seeley v. Hills*, 49 Wisc., 473.

Though, in *New Jersey*, if power to sell land be given to two executors and one be removed, the other may sell: *Weimer v. Foth*, 43 N. J. Law, 1; *Denton v. Clark*, 36 N. J. Eq., 534.

Where an agent was authorized by the owners to sell certain land, exercising his own discretion as to price and terms after an examination of the land, it was held that he might properly employ a sub-agent to find a purchaser, and that a sale made by such sub-agent was binding upon the owners: *Renwick v. Bancroft*, 56 Iowa, 527.

Trustees, guardians, directors of a corporation, etc., are required to show reasonable capacity for the position, scrupulous good faith, and the exercise of their best judgment.

Colorado: *Hake v. Stott's Ex'r*, 5 Col., 140.

English: *Waller v. Penny*, 2 Vern. Chy., 145; *Cook v. Fowler*, L. R., 7 H. L., 27.

Tennessee: *Vance v. Phoenix Ins. Co.*, 4 Lea, 385, 19 Amer. L. Reg. (N.S.), 652.

A trustee, guardian, etc., who employs a proper agent, attorney, etc., is not liable for a defalcation by such agent: *Holeman v. Blue*, 10 Bradw., 130.

A guardian in Alabama who, during the rebellion, received in payment of debts due him in a representative capacity, Confederate treasury notes, while they were the circulating medium, and generally received in payment of debts and in the transaction of business, is not chargeable because the results of the war rendered them worthless: *Anderson v. Wynne*, 62 Ala., 329.

S. P., Parsley, admr., v. Martin, 7 Vir. L. J., 487.

An administrator who collects money upon a judgment founded on a suit in the name of his intestate, is not individually liable to another for a share thereof belonging to such other person, unless before he appropriates the same to the use of the estate he has notice not to pay it over, or unless in paying it over he has acted in bad faith: *Call v. Hondlette*, 70 Maine, 308.

See *Bennett v. Bennett*, 1 Vict. L. R. (Eq.), 280.

Though a trustee has a right to exercise his own discretion, if his action is unreasonable and injudicious the court may control it: *Hancox v. Wall*, 28 Hun, 214.

Where an attorney, employed as agent to loan moneys on bond and mortgage, made loans for comparatively small sums secured by bonds, the obligors in which were insolvent, and by mortgages on real estate, upon which were already mortgages to a large amount, without knowledge on the part of his principal of the existence of such prior incumbrances, and the real estate was sold on foreclosure for much less than the amount of the prior mortgages, held, that these facts justified a finding of negligence on the part of the agent; and that he was liable to his principal for the loss.

Also held, that the fact that the principal received payment on the mortgages without knowledge of the circumstances, did not preclude him from asserting his claim. Nor was the receipt by him of a sum of money from the attorney after the loan was made, which the latter stated to be a gift, a ratification of the transaction, or a waiver of his right of action.

The right of an agent in any case without the assent of his principal to loan on a second mortgage questioned.

The complaint in the action against the attorney contained an offer to assign to him the bonds and mortgages; the point that no tender had been made, did not appear to have been raised upon the trial, no provision was made in the judgment for a transfer. Held, that the objection was not tenable here; also, that if an assignment of the securities was proper, plaintiff had done all that could be required.

It seems that the judgment in such

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case may be amended on application to the court below, by inserting a provision that plaintiff shall assign upon request: *Whitney v. Martine*, 88 N. Y., 585, reversing 47 N. Y. Super. Ct. R., 396.

Trustees, guardians, directors, etc., who act in good faith, and with reasonable care and diligence, but nevertheless fall into a mistake, either of law or fact, are not personally liable for such mistake: 42 Amer. Dec., 290 note.

Alabama: *Anderson v. Wynne*, 63 Ala., 329.

Illinois: *Holeman v. Blue*, 10 Bradw., 130; *Hughes v. People*, Id., 148.

Ireland: *Armstrong v. Armstrong*, L. R., 7 Ir., 207.

Massachusetts: *Bowker v. Pierce*, 130 Mass., 262.

Michigan: *Gott v. Colp*, 45 Mich., 266.

Mississippi: *Klein v. French*, 57 Miss., 662.

New Jersey: *Perrine v. Vreeland*, 38 N. J. Eq., 102, affirmed Id., 596; *Green's Case*, 6 N. J. L., 183; *Citizens, etc., v. Coreyell*, 34 N. J. Eq., 383.

New York: *Chesterman v. Eyland*, 81 N. Y., 898, 8 Abb. N. C., 92, affirming 17 Hun, 520; *Vandyck v. McQuade*, 86 N. Y. 38, reversing 57 How. Pr., 62, distinguishing *Hun v. Cary*, 82 N. Y., 65; *McCabe v. Fowler*, 84 N. Y., 314, 2 Amer. Prob. R., 126, 130 note; *Ormiston v. Olcott*, 84 N. Y., 339; *Matter of Weston's Accounting*, 16 N. Y. Weekly Dig., 497; *Lyons v. Chamberlain*, 89 N. Y., 578; *Mills v. Hoffman*, 26 Hun, 594, 600; *Ainsworth v. Aldrich*, 15 N. Y. Weekly Dig., 199, mem. 27 Hun, 401.

Pennsylvania: *Greenwood's Appeal*, 92 Penn. St. R., 181; *Hanbert's Appeal*, Id., 482.

Scotland: *City Bank v. Frazer*, 17 Scot. L. Repr., 524.

Tennessee: *Vance v. Phoenix, etc.*, 4 Lea, 385, 19 Amer. L. Reg. (N.S.), 652; *James v. Wingo*, 7 Lea, 148.

The by-laws of a corporation provided that a board of directors should elect a secretary, whose term of office should be twelve months, or until his successor was elected, and who was to give bond, with security, for the faithful discharge of his duties. The board elected a secretary, and took the pre-

scribed bond, and re-elected the same person secretary for each of the two following years, but took no new bond, supposing, after consideration and discussion of the question, but without taking legal advice, that the bond taken was a continuing security during those years. The secretary became a defaulter in a third year: Held, that the directors, who were good and efficient business men, stockholders of the corporation and acting in good faith, were not liable to make good the loss: *Vance v. Phoenix, etc.*, 4 Lea (Tenn.), 385, 19 Amer. L. Reg. (N.S.), 652.

Where there is no supine negligence in an executor, the fact that he continues a deposit in a bank upon the same terms originally made by his decedent, will not make him responsible for its loss by the failure of the bank: *Hanbert's Appeal*, 92 Penn. St. R., 482.

A trustee is bound to employ such diligence, care and prudence in the management of the trust as diligent, careful and prudent men of discretion and intelligence generally employ in their own like affairs; and for a neglect to make use of such diligence, care and prudence, the trustee is liable to the *cestui quo trusts*.

New York: *Mills v. Hoffman*, 26 Hun, 594; *Savage v. Gould*, 60 How. Pr., 217, Id., 234.

Vermont: *Spaulding v. Wakefield's Estate*, 53 Verm., 660.

An executor who has notice of a debt due the estate, but takes no steps to collect it, is liable as for a *devastavit*: *Harrington v. Kettletas*, 16 N. Y. Weekly Dig., 494.

Where the will directed all debts to be paid, and the balance to be given to the widow "to dispose of as she may think best for her and our children," and the executor, in kindness and for the interest of the estate, as he thought, together with the widow, assumed a debt due by testator, and the widow, for herself and children who were then minors, received the remainder of the estate, both real and personal, the latter being sufficient to pay all debts: Held, the widow and children took *per capita*, and that the executor, after the personal property was lost, having been required to pay the debt assumed by him, could not look to such real estate for reimbursement. Held, also, that the widow having concurred in his act

and enjoyed the use of the property, her interest in the land was liable to his repayment: *Feemster v. Good*, 12 S. C., 573.

An executor, intrusted with the duty of keeping a legacy for a minor heir until she was of age, paid it over to her guardian while she was still a minor: Held, that the payment did not discharge the executor, and that if the guardian did not pay the legacy to his ward when she became of age, the executor still remained liable.

Money devised to a ward to be paid to her when she becomes of age, but improperly paid over to the guardian while the ward is still a minor, is not received by him as guardian, because he has no business with it; and he is not liable for it on his bond: *Hinckley v. Probate Judge*, 45 Mich., 848.

Where the contest as to the validity of a testamentary instrument is substantially between two sets of legatees or devisees, the executor has no right to espouse the interests of either party to the exclusion of the other, and will not be entitled to credit for legal expenses incurred by him in successfully maintaining the validity of the instrument. *Semble*, that in such case the executor's proper course would be to notify the parties whose interests, as devisees or legatees, are threatened, and require them either to defend the instrument or to furnish the means with which to make a defence: *Ran-kin's Appeal*, 10 Weekly Notes (Penn.), 235.

It is the duty of trustees to invest trust funds held by them in government or State securities, or in bonds and mortgages on unincumbered real estate. While this rule is not arbitrary and uninflexible so as to admit of no possible exceptions, it is the basis upon which trustees should usually act.

See 2 Amer. Prob. R., 307 note; 36 N. J. Eq., 406 note.

Indiana: *Gilbert v. Welsch*, 75 Ind., 557, 2 Amer. Prob. Rep., 302, 307 note; *Tucker v. State*, 72 Ind., 242.

New Jersey: *Fidelity Co. v. United Co.*, 36 N. J. Eq., 405.

New York: *Mills v. Hoffman*, 26 Hun, 593.

Pennsylvania: *Frankenfield's Appeal*, 11 Weekly Notes, 373.

What are termed "bonus mortgages" on properties of uncertain

market value, are not proper security for the investment of trust funds. An auditor found as facts, that certain investments, which were made by a trustee, without approval of court, were in "bonus mortgages" upon real estate so far from the center of the city as to be of a speculative and fluctuating character; and that at the time the mortgages were purchased, they exceeded two thirds of the value of the properties upon which they were secured: Held, affirming the finding of the auditor, that the trustee was guilty of supine negligence, and properly surcharged with the loss of interest resulting from these investments: *Girard Trust Co.'s Appeal*, 18 Weekly Notes (Penn.), 387.

It seems that, as a general rule, investments by executors or testamentary trustees of the funds in their hands, which take those funds beyond the jurisdiction of the court, will not be sustained, and the trustee who so invests does so at the peril of being held responsible for the safety of the investments.

This rule, however, is not so rigid as to admit of no possible exceptions, although the case must be very rare and the circumstances very unusual and peculiar to make it an exception.

The rule relates only to voluntary investments by the trustee, and does not govern a case where, by act of the testator, a foreign investment has been made, or where, without the fault of the trustee, the assets have been transmuted into a debt which can only be secured and saved by taking a foreign security.

Where, therefore, the assets of an estate had all passed into the possession of one of two executors and trustees, and, upon his death, the surviving executor found that the deceased had mingled the assets with his own, and had partly converted them to his own use and partly lost them by unsafe investments, and, as the best possible arrangement to secure the fund, the survivor took from the estate of the deceased a bond secured by mortgage on real estate in Ohio, which was guaranteed by the widow who was sole legatee and at that time solvent, and also took further collaterals for greater safety, the securities being at the time perfectly good; held that it was the

right and the duty of the survivor to accept the securities; and that he could not be made personally liable for so doing.

The rule that each of several co-executors is only liable for his own acts, and cannot be made responsible for the negligence or waste of another, unless he in some manner aided or concurred therein, applies as well where the executors are also trustees.

Also, held, that while it was the duty of the surviving executor to foreclose the mortgage in case of non-payment, he was entitled to exercise the reasonable discretion of an ordinarily prudent man as to the time and occasion: *Ormiston v. Olcott*, 84 N. Y., 339, reversing 22 Hun, 270.

The testator, a resident of Ontario, but temporarily resident in New York, was possessed of real and personal property in Ontario, and also of personal property invested in United States securities. By his will he named one resident of the United States (his brother-in-law), and two persons residents of Ontario, as his executors, to whom he bequeathed all his personal estate, upon trust as soon as conveniently might be to sell, call in and convert into money such part of his estate as should not consist of money, and thereout to make certain payments, and invest the balance of such moneys in or upon any of the public stocks or funds of the Dominion of Canada, of the Province of Ontario, or upon Canadian Government or real securities in the Province of Ontario, or in or upon the debentures of any municipality within the Province of Ontario aforesaid, or in or upon the shares, stocks or securities of any bank incorporated by act of Parliament of Canada, paying a dividend, with power to vary the said stocks, funds, debentures, shares and securities: "and, as respects my American securities, having the fullest confidence in the judgment and integrity of the said W. E. C., my brother-in-law and trustee, I direct my trustees to be guided entirely by his judgment as to the sale, disposal and reinvestment thereof, or the permitting of the same to be and remain as they are until maturity thereof, and I declare that my said trustees or trustee shall not be responsible for any loss to be occasioned thereby." Held, that this did not au-

thorize the reinvestment of moneys realized on the sale or maturing of any of these securities in the United States, but that the executors were bound to bring them into this country, and invest them in one or other of the securities enumerated by the testator: *Burritt v. Burritt*, 27 Grant's Chan. Rep., 143.

It is no part of an executor's duty to resort to devices to evade the lawful assessment and taxation of the estate in his hands; and if in so doing he incurs liabilities or borrows money to buy securities exempt from taxation, and such action results in a loss to the funds in his hands, he will be compelled to make good such loss, however clear it may be shown that he intended to benefit the estate: *Wheelright v. Rhoades*, 28 Hun, 57.

Where an administrator deposits in his own individual name funds of the estate in a bank which fails while holding such deposit, the loss is his own, and not that of the estate; and this though he had no other funds in such bank, and informed its officers at the time of making the deposit that the funds were held by him in trust: *Williams v. Williams*, 55 Wisc., 300, 15 Cent. L. J., 74, 4 Wisc. Leg. News, 332.

The fact that the county does not provide a safe or suitable place where its money may be kept, will not release the treasurer from liability if he deposits it in a bank where, by reason of the failure of the bank, it is lost: *Lowry v. Polk Co.*, 51 Iowa, 50.

Where a female guardian of her minor son, instead of investing her ward's money in real estate, takes perfectly good notes therefor, and marries one who thereupon becomes curator of the minor, and files his inventory in which he charges himself with these notes as so much cash, and takes them from the guardian in full discharge of her liability to the ward, and the curator wastes the estate by neglecting to collect the notes at maturity, he and his sureties are liable, and the guardian is discharged: *The State ex rel. Brebaugh v. Bolta*, 72 Missouri, 272.

By the terms of an instrument creating a trust, the liability imposed on and assumed by the trustee may be limited. If there be a clause fixing the trustee's liability, the rule for measuring such liability must be sought in that clause

properly construed. A strict rule of construction will be applied as against such limitation on such liability, and the construction must be consistent with the object and purpose of the trust.

Maryland: *Bennett v. Rhodes*, 58 Md., 78.

New Jersey: *Tuttle v. Gilmore*, 36 N. J. Eq., 617.

New York: *Crabb v. Young*, 16 N. Y. Weekly Dig., 571.

Where the will creating a trust provided that the trustees should only be liable for loss or damage to the estate occurring through their wilful default, misconduct or neglect,—held they were not liable to replace moneys lost through even an improper or careless investment, unless they have acted wilfully and disregarded the rules which regulate the action of prudent men in their own business affairs: *Crabb v. Young*, 16 N. Y. Weekly Dig., 570.

Where a clause in an instrument creating a trust exempts the trustee from liability, except for wilful and intentional breaches of trust, the trustee is not exempted from liability for losses arising from his having made sales or investments, without instituting proper inquiries and exercising a reasonable judgment in respect to the value of the consideration or securities received, nor for losses arising from investments of trust funds in second mortgages, where no circumstances are shown to justify a resort to such hazardous securities. The fact that the trustee neither made, nor intended to make, any personal gain from his acts, does not exonerate him from liability under that clause: *Tuttle v. Gilmore*, 36 N. J. Eq., 617.

An executor deliberately departing from the instructions of the will, no matter what his motives, cannot impose resulting loss upon innocent devisees: *Feemster v. Good*, 12 S. C., 573; *City Bank v. Gillespie*, 17 Scot. L. Repr., 554.

Even where a trustee is acting in good faith, and is exercising the discretion vested in him by the testator wisely and properly, the owner of the life interest has a right to call upon him, from time to time, to disclose to him the nature and character of the property in his hands constituting the trust fund, to show its value, the income derived therefrom, and the expen-

ses to which the trustee is subjected in its management, in order that he may be able in the future to watch and look after his own interests: *Hancox v. Wall*, 28 Hun, 214.

The relation between a savings bank and its trustees or directors is that of principal and agent, and that between the trustees and depositors is similar to that of trustee and *cestui que trust*.

New York: *Hun v. Cary*, 82 N. Y., 65, 59 How. Pr., 439, affirming 59 How., 426.

See *Vandyck v. McQuade*, 86 N. Y., 38, reversing 57 How., 62.

They are also bound to exercise care and prudence in the execution of their trust, in the same degree of common prudence ordinarily exercised in their own affairs.

New York: *Hun v. Cary*, 82 N. Y., 65, 59 How. Pr., 439, affirming 59 id., 426.

See *Vandyck v. McQuade*, 86 N. Y., 38, reversing 57 How. Pr., 62.

If such trustees transcend the limits placed upon their power in the charter of the bank and cause damage to the bank or its depositors, they are liable.

New York: *Hun v. Cary*, 82 N. Y., 65, 59 How. Pr., 439, affirming 59 How. Pr., 426; *Brincherhoff v. Bostwick*, 88 N. Y., 52, reversing 23 Hun, 237.

See *Vandyck v. McQuade*, 86 N. Y., 38, reversing 57 How. Pr., 62.

United States, Circuit and District: *Bank v. Bossieux*, 4 Hughes, 387.

Directors are liable for losses from loans made on personal security of the stockholders; in violation of a by-law limiting the amount of such loans: *Citizens, etc., v. Coriell*, 84 N. J. Eq., 383.

Where a savings bank in the city of New York purchases from a trustee of such bank, bonds and mortgages owned by him aggregating \$32,000, made by one person upon unproductive property in the city of Brooklyn of uncertain value, not worth twice the value of the mortgages, the trustees making such purchase are liable: *Paine v. Irwin*, 59 How. Pr., 316.

Where a cashier in violation of the statute lends to one customer an amount greater than one tenth of the bank's capital, he is liable for whatever loss occurs on the excess: *Second, etc., v. Burt*, 14 N. Y. Weekly Dig., 290.

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The treasurer of a savings bank, who was also one of its managers, assigned to the bank a bond and mortgage owned by him on lands not worth double the mortgage, as required by the bank's charter, and without submitting the investment to the finance committee for approval as required by its by-laws: Held, that he was liable for a loss sustained on such bond and mortgage, and that the fact that the managers did not object or repudiate the transaction for six years, was no defence, whether his breach of duty was known or not known by the other managers: *Williams v. Riley*, 84 N. J. Eq., 398.

Defendants were trustees of the C. P. Savings Bank, which was incorporated in 1867; up to January, 1878, its average deposits were about \$70,000, and its expenses had exceeded its income. In May of that year, by action of the board of trustees, the bank purchased a lot at a cost of \$29,250, \$10,000 of the purchase-money being paid in cash; the bank covenanting to erect a building thereon to cost not less than \$25,000. Upon the lot the bank erected a building for a banking house at a cost of about \$27,000, and gave a mortgage thereon for \$30,500. The object of the purchase and building was to improve the financial condition of the bank by increasing its deposits. The bank failed in 1875. The lot and buildings, and other property which produced less than \$1,000, constituted all of its assets; the real estate was swept away by foreclosure of the mortgage. At the time of the purchase the bank occupied leased rooms; its assets were insufficient by several thousand dollars to pay its debts, which fact was known to the trustees. By the charter of the bank (chap. 294, Laws of 1868), it had power to purchase a lot for a banking house, requisite for the transaction of its business. In an action brought by the receiver of the bank against the trustees, for damages caused by alleged improper investment of its funds, held that the facts justified a finding that the case was not one of mere error or mistake of judgment on the part of the trustees, but of improvidence and reckless extravagance, and that they were properly held liable: *Hun v. Cary*, 82 N. Y., 66.

Where a loan is made by a savings

bank to three persons of \$20,000, \$15,000, and \$15,000 respectively, upon a promissory note by each for the amount he received, with collateral security of promissory notes of a foreign corporation, which notes are secured by trust deeds of such corporation upon unimproved vacant lots without the State, not worth over \$10,000; and where one of the trustees of the bank at the time of the loan was a large stockholder in said corporation, and the loans were intended to be and were in fact loans to the corporation; such facts being known to the trustees of the bank, or could with reasonable diligence have been learned by them; and where the loans were intended to be to said trustee, and were made because of his interest in the corporation, and the loans were in fact loans upon the security of the lots:

Held, that, under the laws of this State affecting savings banks, such transaction is unauthorized and illegal, and a demurrer to the complaint alleging these facts, in an action to hold the trustees personally liable, will not be sustained: *Paine v. Barnum*, 59 How. Pr., 303.

Where loss is occasioned by the failure of a trustee to exercise ordinary care and judgment, he cannot excuse himself by claiming that he did not possess them; by voluntarily taking the position he undertakes that he does possess and will exercise them, and it is immaterial that the services are rendered gratuitously.

New York: *Hun v. Cary*, 82 N. Y., 65, 59 How. Pr., 436, affirming *Id.*, 426.

See *Vandyck v. McQuade*, 86 N. Y., 38, reversing 57 How. Pr., 62.

This action was brought by the plaintiff, as the receiver of an insolvent savings bank, to recover from the defendants, trustees thereof, money lost by the bank by reason of illegal purchases of North Carolina bonds made by them. After the purchase of the bonds, the superintendent of the banking department having caused the bank to be examined, and having found its financial condition to be unsatisfactory, required the trustees of the bank, as a condition precedent to not closing it up, to give to it their bonds and other securities to make good any and all deficiencies in its assets to meet its

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liabilities. Upon the trial the court below found that the entire loss resulting from the illegal purchase had been reimbursed, principal and interest, by the obligators mentioned in the bond.

Held, that the defendants were released from liability by the payment of the damages sustained by reason of their illegal acts, although such payment was made by other persons, and that this action could not be maintained: *Hun v. Vandyck*, 26 Hun, 587.

An action will not ordinarily lie by a stockholder in a national bank against the president and directors for their neglects and mismanagement of the affairs of the bank, whereby insolvency ensued and the stock became worthless.

English: *Wilson v. Lord Bury*, 3 Q. B. Div., 518; 29 Eng. R., 437.

New Jersey: *Conway v. Halsey*, 44 N. J. Law, 463; *Chester v. Halliard*, 36 N. J. Eq., 313.

New York: *Smith v. Rathbun*, 66 Barb., 402. See S. C. on subsequent appeal, 15 N. Y. Weekly Dig., 403.

See *Smith v. Rathbun*, 75 N. Y., 122, reversing 13 Hun, 47.

United States, Circuit and District: But see *Union v. Douglas*, 1 McCrary, 86.

Otherwise if the defaulting directors, or a receiver under their control, decline or refuse to bring suit in name of the bank or its receiver: *Brinckerhoff v. Bostwick*, 88 N. Y., 52, reversing 23 Hun, 287; *Nelson v. Burrows*, 9 Abb. N. C., 280.

Though in such case the bank be a party, no recovery should be allowed for injury to the stock of the directors and officers who were the wrongdoers in the acts complained of: *Smith v. Rathbun*, 15 N. Y. Weekly Dig., 403, 21 Daily Reg., 609.

One director who is held liable for an act done by several, may have contribution from the others: *Cherry v. Perkins*, 3 Victorian R. (Law), 87.

An executor who gives a separate bond is not liable for a loss caused, without negligence on his part, by the default of his co-executor: See 42 Amer. Dec., 288-293 note; 2 Amer. Prob. Rep., 256 note.

Massachusetts: *McKim v. Aulbach*, 130 Mass., 481.

A joint receipt, or a joint release of

a mortgage, signed by two executors, is only *prima facie* evidence that the money derived therefrom came into the possession or under the control of both, and this presumption may be rebutted by proof that the money was in fact received by one, and that the other joined only as matter of form: *McKim v. Aulbach*, 130 Mass., 481.

In general, unless there are some qualifying circumstances, one of several co-executors has authority to receive payment of a mortgage and to satisfy it; and it makes no difference that the mortgage was an investment made by the executors and not a security received by them from the testator: *D'Inwilliers v. Abbott*, 12 Phila. R., 462.

S. P., *Dilke v. Douglas*, 5 U. C. App. R., 63.

Each one of several co-executors has full power of administration.

A. and B. were executors of an estate. A. made collections and squandered the receipts. Whereupon C., a debtor of the estate, agreed with B. to make no payments to A., except upon orders bearing B.'s signature. A. subsequently presented an order signed by himself as executor and bearing a signature of B. forged by A.; C. in good faith paid this order.

In an action by B. against C. to recover the balance due to the estate; Held, that the payment by C., made on the order bearing A.'s genuine signature and B.'s forged signature, was valid: *Stone v. Union*, etc., 13 R. I., 25.

One of two executors signed a check payable to bearer, and a deposit slip, for the purpose of transferring money belonging to the estate, lying in a bank of which he was manager, and sent these documents to his co-executor for his signature, and on the return of the documents misappropriated the money: Held, that inasmuch as the fraudulent executor must be joined as plaintiff in any action against the bank, the bank was not liable at law for the amount, and,

Semble, that, independently of the estoppel, the bank would not be liable at law for such fraudulent act of its manager: *Nichol v. London*, etc., 4 Vict. L. R. (Law), 324.

While trustees are not generally liable for the acts of each other, this rule does not apply in cases of negligence.

If a will directs an investment to be made in good securities, a trustee who passively permits his colleague to make some other disposition of the property and takes no steps to inform himself respecting it, will be held responsible: *Hillis's Estate*, 18 Phila., 402.

Where an executor receives funds of the estate and delivers them to a co-executor, or does any act by which the funds come to the hands of the latter, and but for which he would not have received them, and he diverts or wastes them, said executor is liable for the loss: *Croft v. Williams*, 88 N. Y. 384, modifying 23 Hun, 102.

See 2 Am. Prob. Rep., 256 note.

Where an executor loaned to his co-executor money, taking his individual note therefor, upon the faith of representations of the co-executor that he desired to use the money to pay debts of the estate, and where it appeared that it was not so used, held, that the money loaned was not a proper charge against the estate.

So, also, where an executor received funds of the estate which he delivered to his co-executor who misappropriated them, held, that said executor was liable therefor: *Croft v. Williams*, 88 N. Y., 384, modifying 23 Hun, 102.

The appellant Storm paid to his co-executor Haight the sum of \$1,200 in good faith, and for the purpose of having him discharge therewith a legacy of that amount given to Haight's wife. At the time the payment was made Haight was reported to be wealthy, and Storm believed him to be perfectly solvent. Haight having misappropriated the money the surrogate, upon Storm's accounting, charged him with it. Held, that this was proper; that Storm parted with the possession of the funds of the estate at his peril, and was answerable for the acts of his co-executor in the same manner that he would have been for the acts of a stranger to whom he might have entrusted them: *Matter of Storm*, 28 Hun, 499.

An executor obtained the signature of his co-executor to checks in their joint account, as executors, by representing to him that he was going to invest the money at a higher interest than the bank allowed; and having obtained the assets of the testator, by means of such checks, misappropriated

them. Held, that the co-executor was liable for such misappropriation: *Jones v. Taylor*, 2 Vict. Rep. (Eq.), 15.

But where an executor is merely passive, not obstructing the collection or receipt of assets by his associate, he is not liable for the latter's waste, unless he assented to it, or having knowledge of a misapplication intended, or in progress, and having the means of preventing it by proper care, neglected to do so: *Croft v. Williams*, 88 N. Y., 384, modifying 23 Hun, 102.

See 2 Amer. Prob. R., 256 note.

Where, however, two executors under a power of sale in the will entered into a joint contract for a sale of real estate, and the purchaser made a payment in the presence of both, which one of them took without objection from the other, and subsequently misappropriated. Held, that, in the absence of evidence charging him with negligence, the latter was not liable; that the fact that the co-executor was insolvent was not alone sufficient to so charge him; and that the fact that he joined in the sale did not make him liable.

Also held, that he was not made liable by acts of negligence on his part, which in no way were connected with or contributed to the loss: *Croft v. Williams*, 88 N. Y., 384, modifying 23 Hun, 102.

See 2 Amer. Prob. R., 256 note.

The will of P. empowered his executors, three in number, to sell his real estate; they made a sale, all joining in the conveyance. The consideration was paid by a check, payable to the order of M., one of the executors: he, in good faith, indorsed and delivered it to G., a co-executor, who obtained the money thereon. On an accounting of the other executors, after the death of G., held, that they were not liable for the sum so received by G.: *Paulding v. Sharkey*, 88 N. Y., 432.

See 2 Amer. Prob. R., 256 note.

An executor, who allows his co-executor to deposit the funds of the estate with a firm of which the latter is a member, is personally liable to those interested in the estate for any loss they may thereby sustain. An executor, who allows his co-executor to receive and retain in his possession all the securities belonging to the estate, is not liable for the wrongful acts of

the latter in misappropriating the said securities and converting them to his own use, when he had no reason to suspect he contemplated so doing, and when it appears that the executor so betraying his trust was a son of the testator, and had, during his father's lifetime, acquired a faultless reputation as a competent, intelligent, reliable, and faithful business man, and had preserved that reputation in the community up to the time when his conversion of the said securities became known.

The fact that the will required the executors to set apart from the estate the shares bequeathed and devised in trust for the testator's daughters and infant sons, and that such separation was in fact never made, would not render an executor liable for such a conversion of the securities of the estate by his co-executor, when it appears that the loss did not follow from, and cannot be attributed to, the omission

to comply with this direction of the testator. The fact that a clerk jointly selected by the executors to keep the accounts of the estate, discovers that one of the executors is converting the securities to his own use, will not render his co-executor liable for the loss, when the knowledge so acquired by the clerk is not communicated to him. An executor, who joins with his co-executor in satisfying a mortgage, in order to render the discharge more formal, but who receives no portion of the moneys arising therefrom, is not liable for the conversion of such moneys by his co-executor: *Wilmerding v. McKesson*, 28 Hun, 184.

Where one of several executors has pledged the testator's property for a debt of his own, an action of detinue by all the executors cannot be maintained, though he was not executor at the time of the pledge: *Hartney v. Higgins*, 6 Vict. L. R. (Law), 65.

[4 Appeal Cases, 711.]

H.L. (E.), June 28, 24, 26; July 28, 1879.

[HOUSE OF LORDS.]

*FRANCIS CHARLES FAIRLIE, *Appellant*; and [711]
CHARLES BOOSEY and JOHN BOOSEY, *Respondents* (*).

Music—Opera in Score—Arrangement for Piano—Registration—Copyright—Publication—4 & 6 Vict. c. 45—7 Vict. c. 12.

An infringement of the registered copyright of the music of an opera may be committed where the opera itself has not been published, and so no copy of it could be deposited, and where that music having been made the subject of two piano "arrangements," one without the voice, another for the voice, and, those arrangements having been published, the infringer has used them for his own production.

In such a case the question of what was intended to be registered will be considered with reference to all the parts of the register, and if certain portions of the forms of registry are, in the particular case, unnecessary and unmeaning, the introduction of them will not affect those portions of the register which are correct.

Offenbach composed, in Paris, the music of an opera called "Vert-Vert." S., by his permission, made two "arrangements" of the music, one for the piano without, the other for the piano with, the voice. The opera was produced at the Opera Comique, in Paris, on the 10th of March, 1869, but was never, as a whole, printed. The two arrangements were printed in a book published in Paris, at 10 Rue de la Chaussée d'Antin, on the 28th of March, 1869. B. became the assignee of the music of the opera, and also of the "arrangements." He sought to register them in England. He filled up the statutory forms required for that purpose. One column of those forms had, in the lower portion, the heading, "Time and place of first representation," and the words, "Théâtre Impérial de l'Opera Comique, Paris, France, 10th March, 1867," but the upper portion of the same column had the words, "Time and place of first publication," under which were the figures and words, "28th

(*) Affirming 23 Eng. R., 592.

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March, 1869. 10 Rue de la Chaussée d'Antin, Paris, France." The form relating to the assignment of the music of the opera was correct in the first two columns, but in the third, under the heading, "Assignee of copyright," were, first of all, the name and residence of B., and then the words, "as assignee of the copyright in the music of the said book, and also of the right of publicly performing such music." The written but unpublished music of the opera was not deposited at Stationers' Hall: the "book" containing the pianoforte arrangements was deposited there. F. pro-712] duced a dramatic representation calling it "Vert-Vert, *music by Offenbach," the music being taken from the "arrangements," but the words were supplied by English writers:

Held, that there had been a sufficient registration of the music of the opera, that this registration was not affected by the reference to the "book" of the arrangements, and that F. had been guilty of an infringement of B.'s rights.

APPEAL against a decision of the Court of Appeal, which had reversed a judgment of Vice-Chancellor Bacon, in an action in which the respondents had been plaintiffs and the appellant defendant. The respondents were music-sellers in Regent Street, and the appellant was the manager of the St. James's Theatre. In the year 1869 Jacques Offenbach had composed a comic opera, to which he gave the name of "Vert-Vert," and on the 10th of March in that year it was produced at the Opera Comique, at Paris. An arrangement of the music of the opera had been prepared for the piano alone, by L. Soumis, and another arrangement, for the piano and voice, had been prepared by the same L. Soumis, and these were printed and published in a book for sale, on the 28th of March, at the Rue de la Chaussée d'Antin, at Paris. Messrs. Boosey claimed to have become the assignees of the opera from Offenbach, and sought to register it within the Copyright Act (5 & 6 Vict. c. 45), and the International Copyright Act (7 Vict. c. 12). The entries at Stationers' Hall were in the following forms :

Time of making the entry.	Title of book.	Name and place of abode of the author or composer.	Name and place of abode of the proprietor of the copyright.	Time and place of first publication.
June 9, 1869.	Vert - Vert, Opera Comique en trois actes, paroles de MM. H. Meilhac et Nuitter, musique de J. Offenbach.	Jacques Offenbach, 11 Rue Lafitte, Paris, France.	Jacques Offenbach, 11 Rue Lafitte, Paris, France, proprietor of the copyright in the music, and of the right of publicly performing such music.	28th March, 1869, 10 Rue de la Chaussée d'Antin, Paris, France. Time and place of first representation : Théâtre Imperial de l'Opera Comique, Paris, France, 10 March, 1869.

Date of entry.	Title of book.	Assigner of the copyright.	Assignee of copyright.
June 9, 1869.	Vert-Vert, Opera Comique, en trois actes, paroles de MM. H. Meilhac et Nuitter, musique de J. Offenbach. See foreign entries, page 115.	Jacques Offenbach, 11 Rue Lafitte, Paris, France, proprietor of the copyright in the music, and of the right of publicly performing such music.	Charles Boosey and John Boosey of 28 Holles street, Middlesex, as assignees of the copyright in the music of the said book, and also of the sole right of publicly performing such music.

The plaintiffs discovered that the defendant had produced, as a dramatic representation at his theatre, the music of the opera, and, as they alleged, "a translation of the said opera." A correspondence ensued between them, and the defendant insisted on his right to continue the representation, and denied that he was in any way infringing any right possessed by the plaintiffs. They therefore took proceedings in the Chancery Division, and applied for an injunction.

The defence was, that the defendant had no reason to believe that there was any copyright in the opera, and he therefore employed Messrs. Mansell and Herman to write the libretto, or words, and they, with the assistance of the director of the theatre, arranged the music for the libretto; that his music consisted only to a small extent of the music of the opera; that he had taken that from Soumis' arrangement, adapting it to different words, and he insisted that, "although the music of the opera might, on the 9th of June, 1869, have been duly registered, yet, in consequence of a proper printed copy of the said opera comique not having been duly delivered to the office of the Stationers' Company, as required by 7 & 8 Vict. c. 12, and by the Convention under the act of 5 & 6 Vict. c. 45, neither Offenbach nor his assignee was entitled to any copyright in England."

It appeared that the full score of the opera had never been printed—certain portions of it had been—but the opera as a whole remained in MS. The arrangements by Soumis had been printed, and a copy of the book containing those arrangements had been *deposited with the Stationers' [714 Company ('). It was therefore contended that there had been

(1) The title page of the book containing the arrangement was in the following words: "Théâtre Impérial de l'Opera

Comique.—A Mons. Victor Capoul.—Vert-Vert, opera comique en 3 Actes.—Paroles de MM. Meilhac et Nuitter.—Mu-

no complete registration of the opera, and that the only registration which had taken place was that of the arrangements by Soumis, which had not been truly described as a book of "music by Offenbach," and so had not been the subject of infringement.

The cause was heard before Vice-Chancellor Bacon, who was of opinion that the registration was a registration of the arrangement by Soumis, that the registration was defective under the 7 Vict. c. 12, in not mentioning the name of Soumis as the author of the pianoforte arrangement from which alone Fairlie had taken the music, and so dismissed the action. On appeal this decision was reversed on the ground that what was intended to be registered was the opera by Offenbach, that the entries were properly made, and that the reference by a date to the publication by Soumis and the deposit of the book containing that arrangement, and the omission to deposit the score of the opera which was only in MS., did not invalidate the registration; and finally, that the dramatic representation of the music of a substantial part of the opera, though taken from the arrangement, was an infringement of the sole right of performing the music, which had been assigned to the Messrs. Boosey (1). The appeal was against that decision.

Mr. Benjamin, Q.C., and Mr. Romer (Mr. Robert Williams was with them), for the appellant: There is no title in the respondents to sustain this claim. The right to protection under the Copyright Acts depends on the exact observance of the provisions of those acts. Here there has not been an observance of them. The respondents have not registered the opera which they now claim as property, and the appellant has not taken anything from what they have pretended to register. They claim to have registered Offenbach's music —*that music has never been published —the appellant has never seen it and has not taken anything from it—no copy of it has been deposited at Stationers' Hall. It has not therefore been registered, and consequently cannot be claimed as copyright. The appellant has used in part, but only in part, the pianoforte arrangement of Soumis, but that has not been registered, so that no infringement can be asserted as to that, but if it had been, the words used by the appellant were not those employed in Soumis' arrangement, but were supplied in the libretto with

sique de J. Offenbach. Partition pour 10 Rue de la Chaussée d'Antin. Londres: Piano seul, arrangée par L. Soumis. Boosey & Co., &c. Déposé selon les Prix net 10f. Paris: E. Hen, Editeur, traités internationaux."

(1) 7 Ch. D., 301; 23 Eng. R., 592.

which Messrs. Mansell & Herman furnished him. He has taken nothing of the words and only a small portion of the music in the arrangement, combining it with music by other composers. This case exactly resembles that of *Wood v. Boosey* ⁽¹⁾. There Nicolai composed an opera in full score at Berlin. After his death Brissler arranged the score of the whole opera for the pianoforte — in registering this arrangement in England, Nicolai's name was put on the register as that of the composer of the music. It was held in the Exchequer Chamber that the full score of the original composition by Nicolai, and the arrangement by Brissler, were two entirely different things, that the latter was an independent musical composition of which Brissler was the composer, and that the entry was therefore invalid and gave no protection to the assignee of the registered composition. They who seek the protection of the Copyright Acts must exactly comply with the directions contained in those acts, for copyright exists only by statute: *Reade v. Conquest* ⁽²⁾. In *Page v. Wisden* ⁽³⁾; *Low v. Routledge* ⁽⁴⁾; and *Boucicault v. Chatterton* ⁽⁵⁾, the necessity of strict correctness even as to the dates of publication was insisted on. And the case of *Reade v. Conquest* also established that two productions, though both of them the works of the same author, and in many respects exactly resembling each other, were still to be treated as different works, and a protection which might exist as to one would not be applicable to the other. Here the work registered was not that of Offenbach but of Soumis. The respondents have not registered Offenbach's music but a printed book, the date of the [716 publication of which they have given as that of the 28th of March, and they have described themselves as the assignees of the "book," and have so entitled themselves, at the utmost, only to be protected against the publication and sale of that printed book. If it was intended to register Offenbach's music in the score, the copy of that score should have been deposited. It had not been so deposited. The sheets containing the original music were something entirely distinct from the arrangement of the book, a copy of which had been deposited. But even the registration of the book was itself defective and invalid, and gave no title to maintain an action of this kind.

Then it is submitted that what has been done here by the

⁽¹⁾ Law Rep., 8 Q. B., 228.

⁽²⁾ 17 W. R., 483.

⁽³⁾ 9 C. B. (N.S.), 755; 80 L. J. (C.P.),

⁽⁴⁾ 38 L. J. (Ch.), 717; Law Rep., 1 Ch. Ap., 42; Law Rep., 8 H. L., 100.

209.

⁽⁵⁾ 5 Ch. D., 267; 22 Eng. R., 73.

appellant is, in itself, perfectly lawful under the provisions of the 15 & 16 Vict. c. 12, s. 6, by which a fair "imitation or adaptation to the English stage" of a foreign dramatic piece is permitted. Here a part only of the pianoforte arrangement was taken, the words of the arrangement were not taken, but others were supplied by two English writers, a completely new and different libretto was made, and there was nothing in what was produced by the appellant but what was in reality a fair adaptation presented to the public.

In *Reade v. Conquest* (¹), it was settled that a novel written by one person might be dramatised by another without the latter being guilty of any infringement of copyright. *Toole v. Young* (²) followed the same rule, the principle being that the production of a drama, even though founded on ideas suggested by a novel previously published, was, in itself, a new and independent work. That was all that had been done here.

Mr. Kay, Q.C., and Mr. Phillbrick, Q.C. (Mr. T. A. Roberts was with them), for the respondents: The argument that the only thing registered is the book, is absolutely displaced by a reference to the entries. Throughout all of them the opera is referred to and the music of it is described to be by Offenbach—and he is described, too, as the person entitled, as the author of the music, to the copyright in it, 717] and to the sole *right of performing it. The date, too, of the first representation is also given. The entries, therefore, are so far perfectly correct. But then there is, no doubt, also an entry of a first publication as upon the 28th of March, which was in fact the date of the publication of Soumis' arrangement, and in another column, which gave the names of the respondents as the assignees, there are the words, "of the copyright in the music of the *said* book." These expressions were inaccurate and unmeaning, for no book had been previously spoken of, and the word "book" had never been previously used. It was found only in the formal wording of one of the columns, as copied from the form given in the schedule to the statute, which column, it was known, was applicable to many other things besides books, and the form of which must be followed and would not be allowed to be altered. There was therefore nothing in that unmeaning expression which could affect the right of the respondents. All the other parts of the entries being perfect, and pointing to the music of the opera alone, could

(¹) 9 C. B. (N.S.), 755; 30 L. J. (C.P.), 209.

(²) Law Rep., 9 Q. B., 523; 10 Eng. R., 152.

not be invalidated by this inaccuracy. The whole of the entries must be taken together, and then there could be no doubt as to what they were intended to describe, namely, the music of the opera. Repeated as were the names of the opera and of the author of the music, every reader of the entries would refer them to the comic opera of "Vert-Vert," by Offenbach, and no one would be misled for a moment by the date of the "28th of March," or the words, "said book." The case was not at all like that of *Wood v. Boosey*(¹), for there the main and substantive part of the description was erroneous, for the name of Nicolai, the composer of the original music, was given, when in fact the thing intended to be registered was, not his original music, but the arrangement made by a third person after Nicolai was dead. The entry was wrong in point of fact, and therefore could not be supported. Here it was right in point of fact, in all respects, but something unnecessary was added, and that unnecessary thing was now put forward as something which was to invalidate all the rest, though all the rest was perfectly clear, good, and in accordance with the statute.

The appellant does not deny that he has taken Offenbach's music, he admits that when he says that he has taken the music *of the arrangement, which was avowedly [718 an arrangement of Offenbach's music, made, too, by his authority. That was a clear infringement of the right of the author of the music. The second case of *Reade v. Conquest*(²) showed that; there the same person produced a drama called "Gold," and then a novel called "It is Never too Late to Mend," founded upon his own drama, containing the same incidents and characters and much of the same language, and the defendant, being at the time ignorant of the existence of the original drama, dramatised the novel, using, of course, the same incidents and characters and language, and that was held to be an infringement of the plaintiff's copyright of the drama itself. The fact that there was no intention to infringe the plaintiff's right was not in that case treated as an answer to the plaintiff's claim. The labor of the plaintiff was appropriated by the defendant, though he did not know of the drama, but supposed that he was dramatising the novel—and, so here, though the defendant, as he said, merely meant to use the arrangement, still, that being the music of Offenbach himself, though by his consent arranged by some other person, he was liable for the infringement—it was an unlawful use of the music of the opera.

(¹) Law Rep., 3 Q. B., 223.

(²) 11 C. B. (N.S.), 479; 31 L. J. (C.P.), 153.

Mr. *Benjamin* replied.

THE LORD CHANCELLOR (Earl Cairns): My Lords, in this case there can be no doubt that the present appellant is an infringer of a musical composition of which the respondents claim to be the proprietors. That appears to be placed beyond controversy by the fact that the performance which he advertised was stated in the advertisement to be "music by Offenbach;" and farther by this, that his case, as stated by himself, is that he was under the belief that there was no existing copyright in this music in this country—that it was therefore public property, and might be publicly performed by him. The question of infringement, therefore, is established beyond the possibility of doubt.

My Lords, it is also, as it appears to me, perfectly clear that the respondents, or those under whom they claim, [719] intended to comply *with the provisions of the Copyright Act, and to make the entry which the act of Parliament requires. If, therefore, they have not done so, it is from error of judgment, and not from any intention of not complying with the provisions of the act of Parliament. The question, therefore, becomes simply the legal one: is the registration which is before your Lordships a compliance, or is it not, with the provisions of the act of Parliament.

Now, on this subject, I have read with care the observations made by Lord Justice Thesiger in the Court of Appeal ('), and I have also had the advantage of perusing the observations which your Lordships will hear from my noble and learned friend, Lord Blackburn, and, having done that, it appears to me that I should be improperly occupying your Lordships' time if I were to go into a repetition of views with which I entirely agree, and with the expression of which I am perfectly satisfied. I will therefore leave my noble and learned friend to make the observations to which I have referred; and I will content myself with moving your Lordships that the judgment of the court below be affirmed, and the appeal be dismissed with costs.

LORD HATHERLEY: My Lords, I have come to the same conclusion upon hearing the arguments at your Lordships' bar, and I have also had the advantage of perusing the views of my noble and learned friend opposite (Lord Blackburn), which he has placed in print in this matter. The plaintiffs in the court below, and the respondents in the case here, seek to have the benefit of the act of Parliament, enacted in aid of authors of musical compositions, namely, the sole right

(') 7 Ch. D., 811; Eng. R., 592.

of representation. Your Lordships are aware that as regards musical compositions there is a double right—a right to secure what is called the copyright of the book, which is the sole and exclusive right of multiplying copies; and also in respect to dramatic performances, a right to secure, under certain conditions specified in an act of Parliament, to foreign composers, the sole right of representation in this country.

In the present case the question depends upon a treaty with *France. The act of Parliament authorizes the [720 entering into treaties by which this right is to be secured to composers upon their fulfilling the requisite conditions. The application must show that the performance had taken place abroad not more than three months before the registration here in England. The registration here in England is required to be of a certain character, upon which, in fact, the whole argument has turned, and the argument is reduced to this narrow point. I will not go into the details of it, because I think that they have been more thoroughly worked out by my noble and learned friend, who will presently address your Lordships. But the point is this—whether or not that which was registered in this case was a sufficient compliance with the act of Parliament, which requires several special things to be specified on registry. When I read the headings of the entries, it will appear manifestly by those headings what the provisions of the act of Parliament are, because they are made to adapt and to fit themselves to the provisions of the act. The headings under which registration has to be made are: [His Lordship read them, see *ante*, pp. 712, 713.]

On the 9th of June, 1869, as it is stated in the case, in alleged pursuance of the provisions of this act, and with a view of obtaining the benefit of the act and the convention founded upon it, a copy of the book containing the arrangement was delivered to the officer of the Company of Stationers, and the requisite entry was made in the book of registry kept at Stationers' Hall. Then what came to be registered was, in effect, a pianoforte adaptation in this particular book, which was deposited, of Offenbach's music; and although I do not think that it affects the question at all one way or the other, it is stated in another part of the case that the whole opera was composed by Offenbach, and was represented by him in France. But the question here is whether this particular thing, which turns out to be simply an accompaniment for the pianoforte, was or was not such a registration of the work within the meaning of the act as to

entitle the person, so registering it, to say that no other person was to have the performance of that work which he had so composed.

In this case I should have preferred having a more complete state of evidence in the matter, but, unfortunately, 721] we are left *wholly without any information from experts as to what may or may not be called the "work" or the "book" in speaking of a musical composition. I think, however, that it will be shown in my noble and learned friend's views that the courts in this country have hitherto considered that any work or printed book which conveys the melodies of the opera to the public mind, and which does, in effect, give the full substance and gist of the composition, may be treated as a registration of *the* book.

Now as far as we can understand from the somewhat imperfect state of the evidence, and as far as it can be shown by other cases which have been decided on the same subject-matter as this, the melodies are to be found in this pianoforte arrangement which was registered. It is said that there was some mistake in making this registration—that some other work was intended to be registered, and that this was registered instead; but I apprehend that if it be found that in all other respects the requisites for registration are complied with—that the limitation of three months which was given by treaty within which the work was to be registered, has been fully and adequately observed on the part of Offenbach—then from what has been previously decided, and notably, I think, in the case of *Wood v. Boosey* (*), where the matter was discussed, what has been done has given him so far a proprietorship in his undoubted work; because as to his being the original composer there is no question raised, except (a point which I shall not enter into in detail) as to the extent to which the pianoforte arrangement can claim to be considered a separate and distinct work. That Offenbach is the author and proprietor of this book is sufficiently clear on the evidence. In another case, that of the composer Auber (*), it was decided that the marrow and pith and substance of the work itself was sufficient to entitle him to have the unqualified and sole right of representation and of multiplying copies, which is all that is insisted on in this suit. All we have to look to is to see whether he has established such a right as entitles him to the sole right of representation.

It appears to me, my Lords, looking to the whole of the entry, and to previous decisions, that we should not be au-

(*) Law Rep., 3 Q. B., 223.

(*) *D'Almaine v. Boosey*, 1 Y. & C., Ex., 238

thorized in saying that he has not done so. Therefore the decision which was *come to in the court below was [722 right, and the appeal must be dismissed.

LORD O'HAGAN: My Lords, in this case I am of opinion that the judgment of the Court of Appeal should be affirmed.

The respondents claim, as assignees of the interest of Jacques Offenbach in the copyright of the music of the opera of "Vert-Vert," the exclusive privilege of publicly performing such music; and the question substantially is, whether Offenbach, when he made his assignment to them had effectually fulfilled the conditions prescribed by 7 & 8 Vict. c. 12, as necessary to vest in him a monopoly of the right to perform, in England, the music of which he was, confessedly, the author?

The contention of the appellant was that the registration relied on regarded not the music of Offenbach and his right to perform it, but an arrangement of it for the piano by Soumis; and the Vice-Chancellor yielded to that contention, declaring that Offenbach had registered a publication "which is quite different from his own original manuscript," and that, therefore, "no copyright was acquired," nor any exclusive privilege of representation.

On the other hand, the Court of Appeal, unanimously reversing the Vice-Chancellor's judgment, has held that the terms of the registration were designed to be, and are, protective not of the arrangement by Soumis, but of the opera of Offenbach, and his right to represent. Forming the best judgment within my power, I think, notwithstanding some difficulty which unquestionably arises from the form of the entries and the lodgment of the book to which reference is made, that they point, with sufficient clearness, to the music of the composer as the subject of the registration and the thing to be protected by it.

The judgment of the Court of Appeal, delivered by Lord Justice Thesiger, is so exhaustive of the case that I can add nothing material to it, either as to the construction of the statute, or as to the effect of the entries in the registry at Stationers' Hall.

In the music of the opera of Offenbach, and the arrangement for the piano by Soumis, there may be two separate properties which may be vested in two several persons by separate registrations. *Offenbach may have the [723 first, with the sole right of representation, whilst the second may belong in Soumis. The short question seems to me to be, to which of them the entries are reasonably and fitly applicable? If to the arrangement, the appeal should be

allowed. If to the music of the opera, we should affirm the judgment.

In the second column of the entry in the books of registry we have the title of the opera, which is described as "Vert-Vert," a comic opera in three acts, the words by MM. Meilhac and Nuietter, "Musique de J. Offenbach." We have nothing to do with the words of the opera, or their authors; the material part of the entry affects the music only. Then in the second column, we have the name of "the author and composer." Of what? Manifestly of the music referred to in the first, and not of any "arrangement" of it, whether for the piano alone or for the piano and the voice. Offenbach is the composer seeking protection, and his music only is to be protected. The fourth column makes this, if possible, still plainer, giving the name, &c., of the proprietor of the copyright. His name is Offenbach, and he is described as "proprietor of the copyright in the music, and of the right of publicly performing such music." What was *the* music of the copyright of which and the right of performing it, he is proprietor? Surely, the "Musique de J. Offenbach" described in the second column, of which, in the third, he is named as the author and composer, and nothing else. The property is in the music, and not in any arrangement of the music. The proprietor is the man who composed the music, and not the man who afterwards made the arrangement. To the latter, so far, there is absolutely no reference. Of his existence or the existence of his work we have no information. Offenbach is the composer who seeks to have his copyright secured; and the copyright is of his music, which he claims to have the exclusive right of performing. Soumis is not mentioned. The arrangement of Soumis is not named. If there had been nothing more in the entry, it would be impossible to suggest that it was meant to affect any one but Offenbach,—any music but that composed by him.

Then comes the fourth column, on which alone such question as exists here has been raised by the appellant. When [724] the entries *were made, a book (since produced to your Lordships) containing Soumis' arrangement for the piano, was delivered to the officers of the Stationers' Company. This book is the subject of one of two entries in the fourth column, under the heading "time and place of publication," and is stated to have appeared on the 28th of March, 1869. But the second entry in that column headed "time and place of first representation" gives for time the 10th of March, 1869, and for place "Théâtre Impérial de

l'Opera Comique, Paris"; and there can be no controversy that the opera represented at that time and place was the opera of Offenbach. Now it cannot be disputed that, if the lower entry had stood alone, Offenbach would have fulfilled all the conditions of registration imposed by the statute, and would have had an unquestionable right to perform the music of his own opera exclusively in England. Taken with the entries in the preceding columns it would have constituted a full statement of his claim to perform that music, and his claim could not, in my opinion, have been denied. I concur with the Court of Appeal that the complete title, so established, cannot be vitiated because of an entry which was unnecessary, a lodgment of a book which was not required, and really was of no effect, and a statement which could not mislead as to the real purpose and object of the registration. The first entry in the fourth column could not, in my opinion, have reasonably led any one to think that the work to be registered was the arrangement by Soumis, in flat contradiction to all the other entries which pointed, as I have shown, unmistakably to the music of Offenbach, and it has not been possible successfully to argue that any valid registration of anything but that music could be accomplished by the entries taken altogether. In *Wood v. Boosey* (¹), as has been properly remarked, the words "pianoforte score" were in the second column, whilst we have here "Musique de J. Offenbach"; and no such words, or any equivalent for them, anywhere qualify the effect of claiming for the composer the right to perform his own music, whatever use others might make of it by arrangement for piano or for voice.

No doubt the headings of the register create some confusion, as they speak of the publication of a book, and the only book delivered *was that which contained Sou- [725 mis' arrangement; but we must take all the entries together, and determine upon the whole what it was proposed to register, and what was actually registered. And so considering them, I find it impossible to hold that they were intended to point to the book produced to us, which is described as containing "Partition pour piano seul, arrangée par L. Soumis." Those words appear upon the title page, but they were omitted in the second column of the entry, which contains the antecedent words "Opera Comique en 3 actes, paroles du MM. Meilhac et Nuitter, Musique de J. Offenbach." The omission of the latter part of the title page goes strongly to sustain the view that the arrangement which it designates was not contemplated as the subject of

(¹) Law Rep., 3 Q. B., 223.

the registration, whilst the retention of the description, "Musique de J. Offenbach," indicates sufficiently the nature and extent of that subject. The book may have been delivered as containing the music which had been arranged, but the needless delivery of it cannot, in my mind, derogate from the validity of the registration of that music and the right to perform it. The larger portion of it was, as I understand, comprised in the arrangement; and, in that way, the book delivered contained substantially the composition which it was intended to protect. It is described in the affidavit of the appellant himself as "a printed copy of a pianoforte arrangement of the music of the said opera."

As to the question of infringement, there seems to be no doubt that a very important portion of the registered music was appropriated by the appellant, in an opera comprising it, along with parts of the works of other composers; and in this way the right secured to Offenbach and his assignees by the registration was substantially violated. Two skilled witnesses having had the fullest opportunity of forming an accurate judgment, swear that "the greater part" of the music of the opera produced by the appellant was that of Offenbach's opera of "Vert-Vert." They specify in detail the pieces which had been transferred from the latter to the former; and no contradiction of this evidence is offered by any one—save that the conductor of the orchestra at the St. James's Theatre, who assisted in arranging the work produced by the appellant, says that only one-third of the music which was appropriated was taken from Offenbach's [726] opera, and not as he *composed it, but adapted from the arrangement, and rearranged. This seems to me a full admission of a substantial infringement; and if it were held justifiable by reason of the adaptation, the security designed by the law for the authors of original music would be practically nullified.

I am therefore of opinion that there was, in this case, an effectual registration of Offenbach's exclusive right to represent this opera, and a clear infringement of that right, and that the appeal should be dismissed, and the judgment of the Court of Appeal affirmed with costs.

LORD BLACKBURN: My Lords, in this case Jacques Offenbach, a Frenchman, composed the music of an opera called "Vert-Vert," and on the 10th of March, 1869, caused it to be represented on the stage of Paris. The words of the opera, as represented, were by Meilhac and Nutter, and to those words Offenbach has set up no claim; but the music was by Offenbach.

Offenbach had, under the International Copyright Act (7 & 8 Vict. c. 12) and the Order in Council applying that act to France, the power of acquiring in this country, for himself or his assigns, two perfectly distinct rights. One was the monopoly, for a time, of the right of printing and multiplying copies of this music; the other was the monopoly, for a time, of performing the whole or any part of the musical composition, created in the case of British compositions, by the joint effect of 3 & 4 Will. 4, c. 15, and 5 & 6 Vict. c. 45, ss. 20, 21. It is the latter of those rights only which comes in question in this cause. Both however were subject to the condition that within the period prescribed by the Order in Council (in case of France three months) he should comply with the conditions contained in the 6th section of the 7 & 8 Vict. c. 12. If these are not complied with, the composer of a work first represented abroad, has no right in this country. If they are, he and his assigns have exactly the same rights as the composer of a work first represented in the British dominions and his assigns have, under the act 5 & 6 Vict. c. 45.

I may observe that as far as regards the inchoate right of the composer to have a monopoly of the representation of his music, *it is not material whether he has, or has [727 not, printed for sale the whole or any part of his music. He may acquire this right, though he has printed for sale every note of his music. He may acquire it though he has never printed a single note. But the conditions to be fulfilled in order to perfect his right are not the same in the two cases. In the present case Offenbach has not exactly done either of those things. The score of the opera has never been published at all; but on the 28th of March, 1869, he published, or at least allowed to be published, in Paris, what on the title page is called the opera of "Vert-Vert," words by Meilhac and Nutter, music by J. Offenbach, "Partition pour Piano seul, arrangée par L. Soumis." This being arranged for the piano alone, had no words printed on it. He also published, or at least allowed to be published, at some time before the entry on the register, what is called, as before, the opera of "Vert-Vert," words by Meilhac and Nutter, music by J. Offenbach, "Partition Chant et Piano, arrangée par L. Soumis." This being arranged for the voice as well as the piano had the words printed as well as the music.

No evidence of experts was given as to how much of the original opera these two arrangements contained. The two books were put in evidence, and produced at your Lord-

ships' bar. As far as I am personally concerned, I cannot read a note of the composition, and have no knowledge of music.

I must, however, when any question comes to me to be decided by me requiring some knowledge of music, acquire the necessary knowledge. In *Wood v. Boosey* (¹), the Court of Queen's Bench, of which I was then a member, had to decide a question requiring some knowledge of what an arrangement for the piano by one, of an opera composed by another, was. I, with diffidence, formed my opinion on the evidence, and expressed it. The case was appealed, and came on before, amongst others, Lord Justice Bramwell, then Baron Bramwell, who is one of the few judges who possesses a scientific knowledge of music, and is qualified to give evidence as an expert. He explained the matter in a judgment reported in the Law Reports (²); and I am of opinion that the knowledge to be derived from what was [728] proved in that case, and from the *explanation of the matter there given by Baron Bramwell, is enough to enable me to decide the present case.

It is as well to state what really was the question in *Wood v. Boosey*, for the case seems to me to have been misunderstood. Otto Nicolai had composed an opera, and caused it to be performed at Berlin on the 9th day of March, 1849. His inchoate rights to a monopoly in this country were exactly the same as those of Offenbach in the present case. The time prescribed by the Order in Council with regard to Prussia is twelve months; that prescribed by the Order in Council with regard to France is three months: that was the only difference. Otto Nicolai died within the twelve months, and neither he nor his representatives did anything to render his rights in this country perfect before the end of the twelve months; and consequently, by the 19th section of 7 & 8 Vict. c. 12, neither he nor his assigns could, after that, acquire in this country any rights as to the music first represented in Berlin.

But on the first of September, 1851, more than twelve months after Nicolai's death, his personal representatives published in Berlin the music of the opera arranged for the pianoforte, and on the 4th of October made an entry in the registry of the opera "Pianoforte score," stating the composer to be "Otto Nicolai." The action was for infringing the right to multiply copies of this pianoforte score. The plaintiffs had to maintain two positions; first, that the pianoforte score contained an original composition, not pub-

(¹) Law Rep., 2 Q. B., 340.

(²) Law Rep., 3 Q. B., at p. 231.

lished at Berlin till within twelve months before the 4th of October, 1851; and, secondly, that the composer of that original composition was Nicolai, who had been dead more than twelve months before the 4th of October, 1851, and had in March, 1849, represented at Berlin the whole opera as he composed it. It was certainly very difficult to maintain both positions, and unless he could maintain both the plaintiff was rightly nonsuited. The nonsuit was upheld on the ground that, though he had made out his first position, he had failed in making out his second.

What I understand to have been proved in that case was, that in an opera the tunes and the harmonies and accompaniment are the composition of the original composer, in that case Nicolai, in this case Offenbach; but that to bring out these tunes and harmonies, and the effect as far as possible of the accompaniment on *any particular instru-* [729 *ment or instruments, farther work is required.* The person who prepares the original score for the performance on the stage by many instruments, and by the voices of many singers, writes down what notes are to be played on each of the instruments, and what notes are to be sung by the different voices. And by that means it is shown what instruments or voices are to play or sing the tune, and what are to produce the harmony and play the accompaniment in a full orchestra and singers. But if the same tunes and harmonies are to be performed on the pianoforte, or sung by voices accompanied by the pianoforte alone, something more is required. It must be indicated what notes are to be played on the pianoforte so as to give the harmony and tune and effect—not precisely the accompaniment as it would be brought out by the full orchestra, for that, as I understood my Brother Bramwell, is impossible—but to give the harmony and tune as near to that effect as the arranger for the pianoforte can contrive. And that arrangement, though it adopts the harmony and tune, is an original composition, or at least a new work.

Now, in the present case, the arrangement for the piano published on the 28th of March did, according to this explanation, contain the whole of the tune and harmony performed in the theatre on the 10th of March; but did not contain all that was there performed, for Offenbach had in effect arranged that tune and harmony for a full orchestra and voices, and it also contained something else, for Offenbach had not arranged that tune and harmony for the piano, but Soumis had.

In the second arrangement for the voice and piano, all

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that was contained in the arrangement for the piano alone, and a little more, was contained ; for that arrangement would indicate what notes were to be sung by each voice when joining in a duet or trio, and that would not be indicated on the piano score. And I will assume in favor of the appellant that this indication of what notes were to be sung by each voice was identical with that contained in the original unpublished score of Offenbach.

My Lords, I do not think it necessary to decide whether the printing and publishing the harmony and tune was a printing and publishing of the musical composition. That, I think, is a question of degree. I take it that if an author 730] of a drama does, in *deference to what he considers the bad taste of the players and audience, leave out what he considers poetical gems, and in their place inserts what he is ashamed of as clap-trap, and allows his drama, thus altered, to be represented on the stage, and then prints his drama as originally written, without the clap-trap and with the poetry, it would be a question of fact and degree whether this drama as printed for perusal in the study, was such a printing of the dramatic composition as represented on the stage, as to oblige him (if wishing to take advantage of the 7 & 8 Vict. c. 12) to notice this printing, and to give a copy of it to the British Museum. In most cases it would be so, and it would always be prudent to act as if it were so. But if afterwards he printed and published a second edition, adding in a note the suppressed clap-traps, I take it to be clear that the printing of these clap-traps would not be a printing of the drama ; it would be the printing of a small part of the dramatic composition as originally represented, but too little to make it a printing of the dramatic composition itself.

Now, in the present case, either the printing of the harmony and tune in the piano score was a printing of the musical composition of Offenbach, or it was not. I do not say which, but the printing of the small part of the score, the voice parts, which was contained in the arrangement for the voice and piano, and was not contained in the arrangement for the piano alone, could not in my opinion be a printing of the musical composition. It is far too small a part to have that effect.

My Lords, if I have correctly apprehended the nature of the two publications of the opera arranged for the piano alone, and the opera arranged for voice and piano, I think there is no difficulty in holding that the decision of the Court of Appeal was right.

The entry states that Jacques Offenbach was the composer, and that he was the proprietor of the copyright in the music, and of the right of publicly performing such music, which was first represented on the 10th of March, 1869. But it also stated that it was first published on the 28th of March, 1869. Perhaps it would have been more precisely accurate to have said, "The music of which opera, with an arrangement for the piano by another author, *and without [731] the arrangements for the orchestra and voice composed by Offenbach, were then first printed." The Vice-Chancellor construed this entry as claiming the whole of what was first printed on the 28th of March, including, therefore, Soumis' arrangement, which Offenbach did not make. I agree entirely with the Court of Appeal that this is not the construction of the entry. I do not think it claimed the arrangement, and I also think that if it had erroneously claimed it, the bad entry alone would not have invalidated the good entry, which had distinctly stated that he was the composer of the opera, first represented on the 10th of March, 1869, and entitled to the sole right of publicly performing such music; which in fact he was.

But the statute 7 & 8 Vict. c. 12, requires that when a composition has been printed, the date and place of the first publication should be entered, and a copy of such musical composition shall be delivered at Stationers' Hall. If the printing of the arrangement of the opera for the piano, containing as it did much the most important of Offenbach's composition, but not the whole score, was a printing of the composition within the meaning of the statute, the provision has been complied with. If it does not amount to such a printing, the precaution of giving a copy to the officer at Stationers' Hall does, I think, no harm.

But it was argued that the printing of the arrangement for the voice and piano contained a little more of Offenbach's composition than the arrangement for the piano alone, and that a copy containing that additional matter should have been delivered. That depends, in my opinion, on the question whether this additional matter printed was so substantial a part of the composition that the printing of it amounted to a printing of the composition. I am of opinion that in no view of the case can it be so considered. I think, therefore, that Offenbach had, on the 9th of June, 1869, complied with the provisions of the 7 & 8 Vict. c. 12, and was owner of the sole right of performing the music in public, to the same extent that a person domiciled in Great Britain, and bringing out the composition in England, would

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have been. Such a person may assign his right, and his assignee may make an entry of the assignment, which, if properly made, relieves him from the necessity of proving [732] the assignment. Here the plaintiffs have proved *by Offenbach's affidavit the assignment, and it is immaterial whether the entry of the assignment was properly made or not. I do not, however, see any defect in it. The fact that a substantial part of the musical composition was performed in public by the defendant, is proved beyond all controversy.

It was argued that the statute 15 & 16 Vict. c. 12, which gives power, *inter alia*, to the author of a dramatic piece first performed abroad to obtain a right to prevent, for a limited period, the performance in this country of representations of translations of such pieces, contains this clause, sect. 6: "Nothing in this act contained shall be so construed as to prevent fair imitations or adaptations to the English stage of any dramatic piece or musical composition published in any foreign country." The respondents do not in any way rely on the 15 & 16 Vict. c. 12, and if they did, nothing that is proved here could amount to a fair adaptation to the English stage, of this opera. Indeed, I own myself unable to understand what those words mean as applied to a musical composition; though they have an intelligible meaning when applied to a dramatic composition first performed in a foreign tongue.

LORD GORDON: My Lords, I agree that the judgment appealed against should be affirmed. I, too, have had an opportunity of perusing and considering the remarks which have been made by my noble and learned friend, Lord Blackburn, and as I concur in the view he has taken, as well as in what has fallen from your Lordships, it is not necessary that I should add anything to what has been already said.

*Judgment of the court below affirmed; and
appeal dismissed, with costs.*

Lords' Journals, 28th July, 1879.

Solicitor for appellant: *E. Johnson.*

Solicitor for respondent: *R. G. Marsden.*

[4 Appeal Cases, 733.]

H.L. (E.), July 8, 10, 11, 28, 1879.

[HOUSE OF LORDS.]

*CHARLES BOYNTON, *Appellant*; and GEORGE H. [733
BOYNTON and Others, *Respondents* (').

Permission to prosecute a Suit—Revivor—Executor—Costs.

An order, under the modern practice, allowing an executor to continue the proceedings in an action instituted by his testator, which order has been obtained by him after a judgment in favor of his testator, and after notice of an appeal against that judgment, is equivalent to the old order for revivor, and subjects him to the same liabilities. He becomes in effect a substantive party to the suit, and is personally liable to costs.

APPEAL against a decision of the Court of Appeal, which had reversed a previous decision of Vice-Chancellor Hall.

The appellant and respondent were brothers, sons of Lady Boynton. At the time of the events which gave rise to the suit Charles Boynton resided with his wife in the house of his mother; George H. Boynton resided in the same neighborhood, with his wife, in a house called Haisthorpe Lodge, which was the property of Lady Boynton, situated at a small distance from her residence. It appeared that Lady Boynton, who was above eighty years of age, at different times made several wills. There seemed to have been a doubt how she would dispose of Haisthorpe Lodge and Farm. On the 30th of March, 1871, Lady Boynton executed a deed of appointment, by which she disposed the Haisthorpe Lodge and Farm in favor of her son George H. Boynton; and the question in the cause was whether this deed had been obtained from her by undue influence exercised by him. Lady Boynton, after having promised so to give it to him, recalled her promise, and said that the deed had been obtained from her by his undue influence, and an action to determine this question was instituted by Lady Boynton herself on the 15th of June, 1871. A great many witnesses were examined on both sides, and in the end Vice-Chancellor Hall, on the 13th of November, 1876, declared that the plaintiff's execution of the appointment of the 30th of March, 1871, had been obtained by undue influence and was void, and ordered the deed to be delivered up to be cancelled; and [734 he also ordered that George H. Boynton should pay the costs of all parties. Lady Boynton died on the 26th of June, 1877, having appointed Charles Boynton executor of her will, and also her residuary legatee. He proved the will in Sep-

(') Affirming 9 Ch. Div., 250.

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tember, 1877. On the 6th of November, 1877, G. H. Boynton served notice of appeal on Charles Boynton as legal personal representative of Lady Boynton; and on the 19th of November, 1877, Charles Boynton, as such legal personal representative, with a view (as he alleged) to the hearing of the appeal, and after an application to him for that purpose, obtained an order authorizing him to continue the suit (the old form being that of an "order of revivor") "in like manner as the plaintiff might have done if she had not died."

The Court of Appeal, on the 16th of April, 1878, after a full hearing of the case and evidence, reversed the decision of Vice-Chancellor Hall, dismissed the plaintiff's bill, and ordered that Charles Boynton should pay the costs of the suit and the costs of the appeal of the respondents, G. H. Boynton and his daughter⁽¹⁾. The question raised upon this matter was whether Charles Boynton was entitled to treat the suit as that of Lady Boynton which he had merely continued as her representative, and not on his own account, and to take these costs out of the estate of the deceased, or was liable to pay them out of his own property.

Mr. *W. Pearson*, Q.C., and Mr. *Everitt*, for the appellant: The judgment of the court below is erroneous on the question of undue influence, and cannot therefore be sustained⁽²⁾.

The judgment was equally wrong in directing Charles Boynton to pay the costs. Charles Boynton was not the plaintiff continuing the action on his own account. It had been commenced by Lady Boynton: it was her action, and at first Charles Boynton had been one of the defendants. The original judgment was in her favor. George Boynton had appealed against it, and the Lords Justices had reversed it. That reversal affected her and her estate, and must be treated as if pronounced against her in her lifetime. In fact, she had died before then, but she had appointed Charles 735] *Boynton her executor, and he was but acting as her representative in continuing an action which she had commenced, and which, as long as she lived, she had continued to carry on. The very words of the permission to continue the suit showed that it was her suit and that he was treated merely as a representative of the original plaintiff. No personal responsibility could, therefore, be thrown upon him. The judgment of the Court of Appeal must be satisfied by the costs being paid out of her estate.

Mr. *Kay*, Q.C., and Mr. *Maclean*, for the respondent, insisted that Charles Boynton had a real interest in the suit,

⁽¹⁾ 9 Ch. D., 250.

⁽²⁾ This question was most elaborately discussed, but does not require a report.

and had adopted it as his own. He need not have obtained the order to continue, which was in substance the old revivor, but he chose to do so, and thereby took the litigation with all its consequences on himself. They referred to *Horlock v. Priestley* ⁽¹⁾, *Cook v. Hathway* ⁽²⁾, and Daniell's *Chancery Practice* ⁽³⁾.

Mr. *Everitt* replied.

THE LORD CHANCELLOR (Earl Cairns), after elaborately reviewing the facts of the case, expressed his complete concurrence with the opinion of the Lords Justices that there was no ground whatever for charging George Boynton with having obtained the deed of the 30th of March, 1871, by undue influence, and on that point moved the affirmance of the judgment of the Court of Appeal. His Lordship then said :

A second and subsidiary question was raised, whether the order of the Court of Appeal was right in fixing the appellant, Charles Boynton with the costs, in place of ordering them to be paid out of the estate of Lady Boynton. I think the decree is right. Charles Boynton was originally made a defendant in the suit in another character, and at that time Lady Boynton was plaintiff. Lady Boynton obtained a decree from Vice-Chancellor Hall, ordering the deed to be cancelled and the costs to be paid to her. She died before the costs were paid, and possibly, but this is not clear, before the deed was cancelled. Notice of appeal was given. In this state of things Charles Boynton obtained the [736 order of the 19th of November, 1877, analogous to the old order to revive, and he was thereby ordered, as legal personal representative of Lady Boynton, to be at liberty to carry on and prosecute the suit against the other defendants in like manner as Lady Boynton might have done if she had not died. This order virtually made him the plaintiff, and in the title to the order of the Court of Appeal dated the 19th of June, 1878, he was ordered to be at liberty to carry on the suit as the plaintiff might have done. He thus adopted the suit, and adopted it *ab initio*. Had he been successful on the appeal he would have retained the cancelled deed, and received the costs ordered to be paid to Lady Boynton, together with the costs of the appeal, and as he has failed, he must, according to the well-settled practice of the court, submit to an order for payment of the costs personally.

(1) 8 Sim., 621.

(2) Law Rep., 8 Eq., 612.

(3) Pages 1244-1284.

LORD HATHERLEY and LORD BLACKBURN expressed their entire concurrence.

Judgment appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 28th July, 1879.

Solicitors for the appellant: *Sharp & Ullithorne.*

Solicitors for the respondent: *Johnsons, Upton, Budd & Atkey.*

See N. Y. Code Civ. Proc., §§ 755-766; 29 Eng. R., 366 note; 30 Eng. R., 399 note.

An action for pure personal tort does not survive the death of the tortfeasor: *Green v. Thompson*, 26 Minn., 500.

An action for damages for an assault does not survive to a personal representative: *Hannah v. R. R.*, 87 N. C., 351.

The provisions of the Code directing the continuance of an action by or against the representatives of a party to the action who has died since the commencement thereof, do not include a case where all the parties are dead at the time of the motion, and by the common law such action abates: *Holsman v. St. John*, 48 N. Y. Super. Ct. R., 306.

An action for damages for breach of promise to marry does not, in North Carolina, abate upon the death of the defendant: *Allen v. Baker*, 86 N. C., 1; *Shuler v. Millsaps*, 71 id., 297.

Where executors or administrators are substituted for a deceased defendant they are liable, in their representative capacity, for costs, and leave to enter judgment against them for costs is unnecessary: *Tindal v. Jones*, 11 Abb. Pr., 258, 19 How. Pr., 469, disapproving *McCann v. Bradley*, 15 How. Pr., 79; *Lemen v. Wood*, 16 id., 285; *Benedict v. Caffa*, 3 Duer, 669; *Mitchell v. Mount*, 17 Abb. Pr., 213; *Merritt v. Thompson*, 27 N. Y., 225; *Hamilton v. Homer*, 46 Miss., 378.

Where an executor brings suit in his representative capacity, he is liable in that capacity for costs if he fail: *Wood-*

ruff v. Cook, 14 How. Pr., 481; *Fox v. Fox*, 22 id., 453, 5 Hun, 53; *Ross v. Alleman*, 60 Mo., 269; note to *Morgan v. Skidmore*, 3 Abb. N. C., 96.

If it be sought to charge them personally with costs, this can only be done on motion to and order by the court: *Bostwick v. Brown*, 15 Hun, 308; *Woodruff v. Cook*, 14 How. Pr., 481; *Fish v. Cram*, 9 Abb. Pr. (N.S.), 252; *Ashton v. Poynter*, 1 Crompt., Mees. & Rosc., 738; *Howe v. Lloyd*, 9 Abb. Pr. (N.S.), 257; *Ross v. Alleman*, 60 Mo., 269; *Morgan v. Skidmore*, 3 Abb. N. C., 93, Ct. Appeals R., 95 note.

Though if they unnecessarily sue as such, they are liable personally of course: *Holdredge v. Scott*, 1 Lans., 303, disapproving, on this point, *Woodruff v. Cook*, 14 How. Pr., 481; *Smith v. Patten*, 9 Abb. Pr. (N.S.), 205; *Ferrin v. Merrick*, 41 N. Y., 322; *Fox v. Fox*, 5 Hun, 53.

Executors and administrators should sue in their representative character only, when the testator or intestate had a complete cause of action in his lifetime: *Harris v. Hanna*, Cas. Temp. Hard. (Lee), 204, and cases cited in Mr. Lee's note; *Woodruff v. Cook*, 14 How. Pr., 481; *Holdredge v. Scott*, 1 Lans., 303; *Fox v. Fox*, 5 Hun, 53; *Boockett v. Bush*, 18 Abb. Pr., 337, 343.

Executors and administrators are liable to costs of appeal or interlocutory costs: *Hunt v. Connor*, 17 Abb. Pr., 466; *Judah v. Staggs*, 22 Wend., 641.

But see *Wiley v. Slam*, 1 Thomp. & Cook, 324.

Or in a special proceeding: *Mills v. Thursby*, 12 How. Pr., 386.

[4 Appeal Cases, 737.]

H.L. (L.), July 28, 29, 1879.

[HOUSE OF LORDS.]

*GARRETT WALSH, EUGENE COSTELLO, and Others, [737] *Appellants*; and HENRY L. PEMBERTON and SAMUEL MURRAY HUSSEY, *Respondents* (¹).

Landlord and Tenant Act (Ireland), 1870—"The Bright Clauses"—Landed Estates Court, Ireland—Parties to a Suit—Parties to an Appeal.

Seemle, that no appeal will lie to this House from the Landed Estates Court in Ireland upon any question of the amount offered for the purchase of an estate sold in that court, or of the person who is the proposing purchaser.

The 33 & 34 Vict. c. 46, the Landlord and Tenant Act (Ireland), 1870, provides, ss. 46-47, that where an estate is to be sold in the Landed Estates Court, facilities shall be given to occupying tenants to become purchasers of their holdings.

P., the trustee of an estate with full powers of sale, became the petitioner for the sale of it in the Landed Estates Court. Many of the tenants desired to become purchasers of their holdings. Several meetings were held by the parties interested. H. offered £80,500 for the estate. Several of the tenants were not satisfied that his proposal contained arrangements sufficiently advantageous for them, and raised objections. Two persons, L. and M., who appeared to act as representatives of the dissenting tenants, offered £81,000 (or £500 more) for the estate. Their arrangements as to the ultimate sales of the holdings to the tenants appeared to satisfy the tenants. Proceedings were had in the court, in which P. and H. and L. and M. became formal parties. The tenants themselves were not parties to these proceedings. The judge of the Landed Estates Court, after a full hearing, decided that the offer of L. and M. ought to be accepted. On appeal this decision was reversed, and the conveyance ordered to be executed to H. No appeal against that order was made by L. and M. Several of the tenants proposed to appeal against it in respect of matters relating to their own interests:

Held, that it was not competent to them to sustain such appeal; that as L. and M., who were parties to the proceedings below, had not appealed, those who had put themselves under the guidance of L. and M., but who had not been parties to the proceedings below, could not now constitute themselves parties for the purpose of raising an issue which had never been raised in the court below.

(¹) Dismissing, L. R., 1 Ir., 428.

See 26 Eng. R., 430 note; 32 Eng. R., 883 note; N. Y. Code Civ. Proc., § 452.

It is error to reverse or modify a judgment without having the parties before the court affected by such reversal or modification. Where several defendants are sought to be charged upon the same demand, and the defence set up by one operates for the benefit of all, it is error to reverse the judgment as to the answering defendant and leave it standing in full force against the others: *Tod v. Stamburgh*, 37 Ohio St. R., 469.

A referee appointed to sell in a partition suit may appeal to the Court of Appeals from an order made upon reading and filing his report depriving him of his fees. Any one can properly be called a party to an order in an action, and if aggrieved thereby may appeal although not a party to the action: *Hobart v. Hobart*, 86 N. Y., 636, reversing 23 Hun, 484.

One of two defendants sued jointly for negligence has no right of appeal from a decision of the trial judge, dismissing the complaint as to his co-defendant: *Popham v. Twenty-third*,

etc., 48 N. Y. Super. Ct. R., 229, affirmed 89 N. Y., 633.

Under section 452 of the Code of Civil Procedure, a person interested in the subject of an action, or in the real property title, the title to which is sought to be affected thereby at the time of filing of the *lis pendens* thereon, has an absolute right to be made a party thereto, if he elects so to do; but whether or not one acquiring such an interest after the filing of the *lis pendens* shall be allowed so to come in and defend, rests in the sound discretion of the court: *Earle v. Hart*, 20 Hun, 75.

Where, after the commencement of an action, a third party becomes interested in the litigation by assuming the liabilities of the defendant in respect to the claim plaintiff is seeking to enforce, it is proper to allow a supplemental complaint bringing in such third party as a co-defendant.

Where, therefore, after the commencement of an action against a railroad company upon a contract, it appeared that it and other companies were merged in a new company, the latter having assumed all of the contracts, liabilities and obligations of the original companies; held, that an order allowing defendant to file a supplemental complaint bringing in the new company as defendant, was properly granted: *Prouty v. Lake Shore & Mich. So. R. R. Co.*, 85 N. Y., 272, distinguishing *Milner v. Milner*, 2 Edw. Chy., 114; *Buchanan v. Comstock*, 57 Barb., 583; *Tiffany v. Bowerman*, 2 Hun, 643; *Waltson v. Thibon*, 17 Abb. Pr., 184; *Pinch v. Anthony*, 10 Allen, 470.

When a person's rights, reputation, or other important interests may be injuriously affected by what there is reason to believe is a friendly litigation between others, justice requires that he should be allowed to intervene so far as may be necessary for his own protection: *Tilby v. Hayes*, 27 Hun, 252, 14 N. Y. Weekly Dig., 449; *Attorney-General v. North American*, etc., 6 Abb. N. C., 293, 304 note.

An applicant to insure should not be allowed to do so unless it is necessary to protect their rights in the fund and to protect the fund against fraud and waste: *People v. Globe*, etc., 27 Hun, 539.

The interest which entitles a party to intervene in an action pending between other parties, under general statute 1878, c. 66, § 131, must be in the matter in litigation in the suit as originally brought, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment thereon.

The plaintiff brought suit to recover of the defendants, as the makers of certain promissory notes, the amount thereof, and a writ of attachment was issued therein, on his application, by virtue of which certain personal property belonging to two of the defendants was seized. Afterwards, and before judgment, the intervenors filed in the action their joint complaint in intervention, setting up separate claims and demands against such two defendants for goods sold and delivered to them. After setting up the nature and the amount of their respective claims, they alleged that the notes sued on by the plaintiff were without consideration, and were given in pursuance of a fraudulent conspiracy between plaintiff and defendants to cheat and defraud their creditors, the intervenor, and that the plaintiff's action was commenced, and the writ of attachment procured, and the property seized thereunder, in furtherance of such conspiracy; that the defendants whose property was so attached, had no other property except the attached property, and that that was inadequate to pay their just debts, and insufficient to pay the plaintiff's demand; that the intervenors had each commenced actions on their several demands against such defendants, and had caused writs of attachment to be issued in their several actions, and to be executed upon the same property attached by the plaintiff, their attachments being subsequent to his in point of time, and praying that the plaintiff's attachment be postponed to those of the intervenors. Held, that the complaint of the intervenors did not disclose such an interest in the subject-matter of the suit as to entitle them to intervene, and that the plaintiff's motion to dismiss the same should, therefore, have been granted: *Lewis v. Harwood*, 28 Minn., 428.

One creditor of the common debtor

has no right to be made a party to another creditor's suit, or to intervene in it at any stage of its progress, the suit being an ordinary action at law for the recovery of a debt : *Askew v. Carswell*, 63 Geo., 162.

In suit on a note and mortgage, where creditors of the defendant intervened, alleging the note and mortgage to be fraudulent as against them, the intervenors cannot prevent a judgment for plaintiff against defendant. The most they can claim, is protection against the enforcement of the judgment to their prejudice.

The interest which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. It must be that created by a claim to the demand, or some part thereof, in suit, or a claim to, or lien upon the property or some part thereof, which is the subject of litigation.

A simple contract creditor of a common debtor cannot intervene in a foreclosure suit.

But judgment creditors being such subsequent incumbrancers may intervene.

And a court may order them to be made parties, probably by an amendment of the complaint as the better course, or on petition of intervention.

Subsequent creditors cannot complain that the note and mortgage of a common debtor were executed without consideration. As against subsequent creditors a conveyance, even if voluntary, is not void, unless fraudulent in fact, that is, made with the view to future debts : though the evidence of an intent to defraud existing creditors is deemed sufficient *prima facie* evidence of fraud against subsequent creditors : *Horn v. The Volcano*, etc., 18 Cal., 62.

The firm of Haas, Pike & Co. transferred all its property, real and personal, to S. N. Pike, one of the partners, upon the agreement that he should sell the property, pay the firm debts from the proceeds thereof, and divide what might remain between the plaintiff and himself. Pike died in possession of the firm property, leaving a will, by which he devised his estate to the defendants, in trust, to manage

the same and apply the profits thereof to the use of his children until the youngest should become of age, and then to divide the same equally among them. After all the children had come of age, the plaintiff brought this action against the defendants, as executors and trustees, to compel them to account for the property received by their testator from the firm, and to pay to plaintiff his share thereof. One of the children applied to be made a party to the action, to enable him to protect his interest in the estate. Held, that the application should have been granted.

No supplemental summons need be served where one is made a party to an action on his own petition : *Haas v. Craghead*, 19 Hun, 396.

A party allowed to intervene may appeal from any determination made in the suit or proceedings : *Atty. Gen. v. North Amer.*, etc., 77 N. Y., 296, 6 Abb. N. C., 293 below, and note p. 304.

Where a corporation is in the hands of a receiver and certain of its policy holders were allowed, by order, to intervene ; held, that the court has no power to allow them or their attorneys counsel fees out of the fund ; nor are such policy holders entitled to costs from said funds : *Atty. Gen. v. Continental Life*, 27 Hun, 195, 14 N. Y. Weekly Dig., 450 ; appeal dismissed, 15 id., 247.

See *Barnes v. Newcomb*, 89 N. Y., 106, *Laws N. Y.* 1883, chap. 378, § 6, p. 559.

An attorney, retained by an assignee for the benefit of creditors, is not entitled to be repaid by him, out of the assigned estate, disbursements made in contesting proceedings to have the debtor adjudicated bankrupt, in which proceeding he appeared for certain creditors ; there being no evidence of any resulting benefit to the creditors generally : *People v. Lockwood*, 9 Daly, 68.

Where objections to the account filed by an executor are referred to an auditor, and his report finding his account correct is confirmed, no allowances out of the estate should be made to proctors who have appeared upon the accounting for adult legatees and filed no objections ; nor to a proctor for a general guardian for services in filing objections that have not been sus-

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tained. Allowances may properly be made to special guardians, appointed to protect the interests of minors, for services in examining the account, but not to the attorney of the general guardian of one of such minors for the same service. And where the services of an attorney, in bringing an action for the

construction of the will, have proved beneficial, having increased the personal estate, he is entitled to an allowance; but the amount should not be fixed before the determination of an appeal taken by him from the order confirming the auditor's report: *Matter of Meeker*, 9 Daly, 556.

[4 Appeal Cases, 755.]

H.L. (E.), July 15, 18, 31, 1879.

[HOUSE OF LORDS.]

**755] *DAVID AITCHISON and A. F. BRANDT, *Appellants*;
and HAAGEN ALFSEN LOHRE, *Respondent* (').**

Policy of Marine Insurance—Indemnity—Partial Loss—Value of Ship—Suing and Laboring Clause—Costs.

A policy of marine assurance is not a contract of mere indemnity.

General average and salvage do not come within either the words or the object of the suing and laboring clause of a policy of marine assurance.

Salvage expenses are not assessed upon the *quantum meruit* principle, but on the general principle of maritime law, rewarding persons who by great, and perhaps dangerous, exertions bring in a ship, for which exertions, if not successful, nothing would have been paid.

The assured, who had not abandoned, but had elected to repair, after damage sustained from perils of the sea, was *held*, therefore, not entitled to recover under that clause the expenses of salvage.

But *held* that, up to the amount insured, he was entitled to recover the cost of repair, with the reduction of one-third new for old, even although the amount, calculated upon that principle, should exceed the amount that would be payable upon a total loss with benefit of salvage, and should equal the whole sum insured.

The ship *Crimea* was insured with the defendant for £1,200, being valued in the policy at £2,600. It encountered very bad weather, and was in danger of sinking: it was rescued by a steamer, which obtained from the Irish Court of Admiralty £800 as salvage money. The owner did not abandon, but elected to repair. The defendant's proportion of the repair expenses amounted (after the deduction of one third-new for old) to £1,200, the full sum he had insured, and he was held liable to that amount; but was held not to be liable to any part of the salvage expenses.

There were cross appeals. Neither party was completely successful. No costs were given.

APPEAL against a decision of the Court of Appeal, which had partly sustained and partly varied a previous decision of the Queen's Bench Division.

A policy of insurance for £1,200 had been effected on a vessel called the *Crimea* for a voyage from the Clyde to Quebec or St. John's, and thence to the United Kingdom. The policy was in the usual form, and contained the usual suing and laboring clause. The defendant paid into court the sum of £1,080. The plaintiff replied, denying the sufficiency

(') Affirming 21 Eng. R., 226; reversing 3 Q. B. Div., 558.

of the sum thus paid in. A *special case was stated [756 for the opinion of the court, which was to be at liberty to draw inferences of fact (').

The policy was for £1,200. The ship was, in the policy, valued at £2,600. The real value was stated to be £3,000. The outward voyage was performed in safety. On the homeward voyage the ship encountered such severe storms that it was in danger of being lost, when it was saved and carried into Kingston Harbor by the steamer Texas, to which the Irish Court of Admiralty afterwards awarded £800 for salvage.

The ship was nearly sixteen years old, and its value as it lay damaged in the docks after the storms was stated to be £998. The owner did not give notice of abandonment, but signed a contract for repairs for a sum of £2,982. The repairs were executed at that sum. The amount of salvage and general average expenses borne by the ship was stated to have been £519. The ship had not before been metalled, but it was metalled in the docks at a cost of £695. That was not sought to be made a charge against the underwriter. The whole sum expended on the ship was stated in the case to have been £4,414. This was subject to the ordinary deduction of one-third new for old. The value of the ship after all the repairs had been effected was estimated at £7,000. Putting together the charges which the plaintiff contended he was entitled to claim against the underwriter, they amounted to £1,707. The claim was resisted on the ground that there had only been a partial and not a total loss, actual or constructive, and that the underwriter could not be made liable, on a partial loss, to a greater amount than in the case of a total loss, in which he would have the benefit of salvage. The Queen's Bench Division had decided that the cost of repair, making the usual deduction of one-third new for old, was the measure of the loss if the shipowner elected to repair; and consequently that the assured was entitled to recover such cost of repair up to the amount insured for, even though the loss so estimated might amount to more than a total loss with benefit of salvage. But the assured was held not entitled to recover any portion of the salvage expenses over and above the £1,200 (*). *The plaintiff, the shipowner, appealed against the [757 last part of the decision; the defendant, the underwriter, appealed against the first part. The judgment was affirmed as to the claim for the expenses of repair, but it was reversed

(') See 2 Q. B. D., 503; 8 Q. B. D., 558, where the circumstances are fully detailed.

(*) 2 Q. B. D., 501; 21 Eng. R., 226.

so far as related to the salvage expenses, they being added to the amount for which the policy was underwritten⁽¹⁾. This appeal was then brought.

Mr. *Benjamin*, Q.C., and Mr. *J. C. Mathew*, for the appellant: There was no total loss; if there had been, the underwriter would have been liable upon that, but then he would have had the benefit of salvage. There was only a partial loss, and that being so, the underwriter cannot be made liable to the full amount of the sum insured, as if there had been a total loss, and made so liable without benefit of salvage. Yet that is the claim here. Such a claim cannot be supported. "A partial loss is one in which the insurers are liable to pay an amount less than that insured for damage happening to the subject, or expense incurred and occasioned by the perils insured against, in distinction from a total loss, in which the insurer is liable to pay the entire value at which the subject is insured": Phillips on Insurance⁽²⁾. What is sought to be done here would completely destroy that distinction, and subject the insurer to the payment of a larger amount than if the subject had been entirely lost. It is admitted that the assured is not bound to abandon; all the authorities agree in that: Phillips⁽³⁾. But then he must not repair at a cost which exceeds the sum insured, and make a profit at the expense of the insurer, for an insurance is not to become a source of profit to the assured: Emerigon⁽⁴⁾. The assured is entitled under his policy to be indemnified against loss, but not to be put, at the cost of the insurer, into a better position than at the commencement of the voyage and before any loss had happened. If he could do that, he could in this case charge for the metalling of the ship, which was admitted to be entirely out of the calculation. As the case now stands, the assured, by getting a ship worth £7,000, instead of £3,000, will be largely benefited. That was not the intention of a policy of insurance, which is purely a contract of indemnity.

And it is undoubtedly clear that the insurer is not liable 758] for the *salvage expenses. They do not properly come within the meaning of the suing and laboring clause. Such expenses are only chargeable when incurred with the object of avoiding a total loss, or of reducing a total loss to a partial loss, in other words, for the benefit of the insurer: Arnould⁽⁵⁾. They could not in any way benefit the insurer here, for there had been no abandonment, and, except

⁽¹⁾ 3 Q. B., 558.

⁽²⁾ Chap. xvi, s. 1422.

⁽³⁾ Chap. xvi, s. 1493.

⁽⁴⁾ Chap. i, s. 3.

⁽⁵⁾ 5th ed., pp. 245, 779.

upon abandonment, he cannot obtain anything from salvage. That was the position laid down by Mr. Justice Lush in delivering the judgment of the Queen's Bench Division⁽¹⁾, and that is the reasoning in *Phillips on Insurance* on this question⁽²⁾. The case of *Kidston v. The Empire Marine Insurance Company*⁽³⁾ did not establish the construction for which the assured now contends, for that was the case of an insurance on freight; the expenses were incurred in order to save the freight, and the freight was saved, and the underwriter was in that way subjected to a smaller loss, and so the suing and laboring clause was held to apply, but it had no application to this case. There is nothing in common between the two cases. But even in that case Mr. Justice Willes⁽⁴⁾ expressly says, "That clause must be limited in application to cases in which the underwriter might incur liability, and therefore might derive a benefit from the extraordinary exertion." He could derive none here, and so was not to be made liable for the expenses of that exertion.

Mr. *Cohen*, Q.C., and Mr. *F. W. Hollams*, for the respondent, were desired to confine themselves to the second point, that which related to the claim for salvage expenses.

Those expenses were absolutely necessary to be incurred, and were like those which were incurred in getting a ship off rocks in order to bring it into dock to be repaired; and such expenses were always held to be properly included in the expenses for repairs. In *Lidgett v. Secretan*⁽⁵⁾ no doubt was suggested as to all the expenses incurred in bringing the vessel into dock, and the dock dues for keeping it there, up to the time of the fire which destroyed it. There is not, in the suing and laboring clause, any expression of such a restrictive meaning as is now sought to be put on that clause. *On the contrary, the insurer binds himself to con- [759
tribute to the charges in the "defence, safeguard, and recovery" of the goods and ship, and sums paid for labor and exertions in securing the vessel from total destruction may well come within that description.

Mr. *Mathew* replied.

LORD BLACKBURN: My Lords, in this case the respondent insured £1,200 on a ship, the *Crimea*, valued in the policy at £2,600, with the appellant's company, on a voyage out and home. The policy was against all the usual perils, and contained the usual suing and laboring clause.

⁽¹⁾ 2 Q. B. D., at p. 508.

⁽²⁾ Chap., xvii, s. 1716.

⁽³⁾ Law Rep., 1 C. P., 535; affirmed,

Law Rep., 2 C. P., 357.

⁽⁴⁾ Law Rep., 1 C. P., 550.

⁽⁵⁾ Law Rep., 6 C. P., 616.

The appellants paid into court £1,080, being at the rate of 90 per cent. on £1,200, and the question was whether, under the circumstances stated in a special case, this sum was sufficient, or if not, how much more the plaintiff below (the respondent in this House) was entitled to recover. The Queen's Bench Division was of opinion that the amount recoverable was £1,200, or 100 per cent., and gave judgment for £120 beyond the amount paid into court. Both sides appealed, and the Court of Appeal was of opinion that the sum recoverable was 100 per cent. in respect of the direct damage to the ship, and a farther percentage in respect of the salvage and general average charges. The record was so imperfectly drawn up that it does not appear on it what was this farther percentage. The counsel at the bar of this House agreed that if the judgment of the Court of Appeal was affirmed, that percentage should be some rate which they agreed on between themselves. Some anxiety was expressed lest it should be supposed that in sanctioning this agreement, this House would determine some question of principle which was given up by one side or the other as of no practical importance in this case, though it might be of importance in other cases. The House certainly determines no such point, and indeed was never informed what this point was.

It appears from the statements in the case that the *Crima* on the voyage home during the month of January encountered a succession of stormy weather, and in consequence [760] of the perils of *the seas great damage was done to her, and she was reduced to a leaky and water-logged condition. It appears, incidentally, that some general average had arisen, for a proportion of which the ship was liable. The case then states that "On the 30th of January, the ship, being then in great danger of being completely lost, and being without fresh water or provisions, and in a helpless condition and not capable of being navigated, those on board of her sighted the steamship *Texas*, which ultimately took her in tow, without any agreement being come to as to remuneration for the service, and took her into Queenstown, and on or before the 11th of March she was placed in safety near the wharf of the Victoria Dry Dock Company."

It may be as well here to point out that the liability of the articles saved to contribute proportionally with the rest to general average and salvage, in no ways depends on the policy of insurance. It is a consequence of the perils of the sea, first imposed, as regards general average, by the Rhodian Law many centuries before insurance was known at

all, and, as regards salvage, by the maritime law, not so early, but at least long before any policies of insurance in the present form were thought of. No claim for remuneration from the owner is given by the common law to those who preserve goods on shore, unless they interfered at the request of the owner: *Nicholson v. Chapman*. There Chief Justice Eyre, in delivering the considered judgment of the court, says⁽¹⁾, that in respect of salvage, "the laws of all civilized nations, the laws of Oleron, and our own laws in particular, have provided that a recompense is due for the saving, and that our law has also provided that this recompense should be a lien on the goods which have been saved. Goods carried by sea are necessarily and unavoidably exposed to the perils which storms, tempests, and accidents (far beyond the reach of human foresight to prevent) are hourly creating, and against which it too often happens that the greatest diligence, and the most strenuous exertions of the mariner, cannot protect them. When goods are thus in imminent danger of being lost it is most frequently at the hazard of the lives of those who save them that they are saved. Principles of public policy dictate to civilized and commercial countries not only *the [761] propriety but even the absolute necessity of establishing a liberal recompense for the encouragement of those who engage in so dangerous a service . . . Such are the grounds upon which salvage stands; they are recognized by Lord Chief Justice Holt in *Hartfort v. Jones*"⁽²⁾).

The *Crimea* had been before these disasters worth £3,000; as it then lay in a damaged condition it was of the value of £998. The damaged ship was liable to make good its proportion of the general average and of the salvage incurred for the preservation of ship, freight, and cargo; and that proportion of the two taken together amounted to £519 0s. 1d.

My Lords, I think it convenient to pause here and inquire what would have been the loss to an uninsured owner from the perils of the seas under such circumstances. If such an uninsured owner chose to sell the hull as it lay, his position would be this: he would lose the value of the ship, £3,000. He would receive £998, the value of the hull, less £519, the amount of general average and salvage which was a charge on the hull, or £479; and his loss would be £2,521. And if the hull had been so damaged that to repair it would have cost more than the ship would, when repaired, have been

(¹) 2 H. Bl., 254, at p. 257.

(²) 1 Ld. Raym., 393.

worth, the prudent shipowner would have taken this course. But in fact he not only could, but did repair it, and by an outlay of about £5,600 (part of which, about £1,200, was for new works), he made the ship worth £7,000; and then (still assuming him to be uninsured) his position would have been this: original value of ship, £3,000; salvage and average, £519; expenditure, £5,600; total, £9,119; value of repaired ship, £7,000; loss £2,119, to which are to be added some particular charges amounting to apparently £235, bringing the loss up to £2,354.

The contract of insurance is a contract of indemnity, and, if it could be worked out as a perfect indemnity, it would follow that 90 per cent., the sum paid into court, which on £3,000 amounts to £2,700, was more than sufficient. But as was said in the opinion of the judges in *Irving v. Manning* (¹), "A policy of assurance is not a perfect contract of indemnity; it must be taken with some qualifications." One of those is commonly expressed as the allowance of 762] one-third for new for old; and it is on the *application of that to the present case that the first question arises.

The owner of an insured ship which is so damaged that, though it is capable of repair, the expense of repairing it will exceed its value, may treat the ship as totally lost, and recover a total loss, the underwriters who pay that total loss being entitled to all that is saved. The assured is not, even then, bound to do so. But if the ship can be practically repaired within the meaning of that phrase, as explained by Mr. Justice Maule, in *Moss v. Smith* (²), the assured has not the option to treat it as a total loss; and on the figures stated in the special case the respondent here had not that option. He may repair the damage done by the peril insured against, and if he does so the damage would, in general, be what would be the reasonable cost of making the ship as good as it was before. The actual outlay on the repairs, if *bona fide* made, would be strong evidence what the reasonable cost was, and if the ship was by that outlay made more valuable than it was before the accident, which would generally be the case with an old ship, there should be an allowance for this increased value. It is obvious that, applying this, there would be great room for disputes and litigation on the adjustment in every case where repairs were executed, whether the repairs were extensive or not.

In the present case, where the ship was fifteen or sixteen years old, and the damage was extensive, it is probable, as is said in the judgment of the Queen's Bench Division, that

(¹) 1 H. L. C., 287, at p. 307. (²) 9 C. B., 94, at p. 103; 19 L. J. (C.P.), 225, at p. 228.

the extent to which it was benefited by having new materials instead of old was much more than one-third of the expenditure; probably two-thirds might be nearer the fact. But I think that it is clearly established by a long course of practice, and by many decisions, that, for the purpose of avoiding the expense of litigation, a custom of trade has arisen which, though not written in the policy, is implied in it. The parties to a policy of insurance on a ship tacitly agree that, in case of repairs fairly executed to replace damage occasioned by one of the underwritten perils to a ship of the age and character to which the custom applies, the loss shall be estimated at two-thirds of the cost of the repairs; neither more nor less. It is self-evident that this can very seldom be the accurate measure of the loss. In most [763 cases the rule operates favorably for the underwriter, as the shipowner in spending money on repairs seldom benefits his ship to the extent of one-third, and in such cases the payment of the sum so fixed by custom falls short of a perfect indemnity. In some cases, and this is one, the benefit to the ship exceeds one-third, and there the assured receives more than a perfect indemnity. But if it were lawful to open up the question and depart from the rule in any case, the whole object of it, which is to avoid litigation and expense, would be frustrated. No authority has been cited, and as far as my knowledge goes, no authority exists, for any qualification of the general rule which would take this case out of it. If the rule applies, two-thirds of the expenses of repairing the sea damage are to be charged to the ship. The expenses of making additions to the ship are not of course to be charged; they are not in any way a consequence of the perils of the sea. The arbitrator has found that the expenses to which the rule is applicable were £4,414 18s. 11d. This finding is binding. Now two-thirds of this sum is in round numbers £2,943, or very nearly 100 per cent. on £3,000. According to the finding in one paragraph there are other particular charges on the ship, the nature of which is not stated, which bring up the loss to £3,178 11s. 7d., which is more than 100 per cent.; and if the salvage and general average expenses are added the loss will be very considerably more than 100 per cent.

In Phillips on Insurance⁽¹⁾, that very experienced author finds great fault with the decision of the Court of Common Pleas in *Le Cheminant v. Pearson* ⁽²⁾ (so long ago as 1812), that more than the subscribed amount may be recovered where there are successive losses, which he seems to think can

⁽¹⁾ Sect. 1743; see also sect. 1136.

⁽²⁾ 4 Taunt. 367, at p. 380.

only be supported on the ground of inveterate practice. No question, however, of that kind arises here, for this is a case of one single loss; as to which he says that we know "The liability of insurers in a single loss is without question limited to the amount insured, and the expense of suing," &c. No authority in contradiction to this was cited, and I am not aware of any; and the position thus laid down in Phillips was adopted by all the judges below, who consequently [764] *limited the amount recoverable under the policy, as far as it related to the indemnity for the underwritten perils, to 100 per cent., or in this case £1,200, or £120 beyond the amount paid into court, I think it clear that they were right both in going so far, and also (which I think was scarcely contested at the bar) in not going farther. On this, the first question, on which both the courts were agreed, the judgment below should be affirmed.

But there is a second point on which the courts below differed. The policy contains the usual clause as to suing or laboring. The Queen's Bench Division was of opinion that the salvage, or general average expenses, described in the case did not come within that clause. The Court of Appeal was of a different opinion. In the judgment delivered by Lord Justice Brett, it is said (') that "the general construction of the clause is that if, by perils insured against, the subject-matter of insurance is brought into such danger that, without unusual or extraordinary labor or expense, a loss will very probably fall on the underwriters, and if the assured or his agents or servants exert unusual or extraordinary labor, or *if the assured is made liable to unusual or extraordinary expense in or for efforts* to avert a loss, which, if it occurs, will fall on the underwriters, then each underwriter will," &c. Now if the part of this which is above emphasized is correct, there can be no question that both salvage and general average are unusual expenses to which the assured have become liable in consequence of efforts to avert a loss. And such seems to be the opinion of the editor of the last edition of Arnould on Insurance, who says (") that salvage "is recoverable from him in virtue of an express clause in the policy inserted for such a case, and known as the sue and labor clause;" but for that position he cites no authority, and though the Court of Appeal in this case agreed with him, I am unable to do so. With great deference to the judges of the Court of Appeal, I think that general average and salvage do not come within either the words or the object of the suing and laboring clause, and that there is no au-

(') 3 Q. B. D., at p. 566.

(") 2 Arn., 5th ed., at p. 778.

thority for saying that they do. The words of the clause are that in case of any misfortune it shall be lawful "for the assured, their factors, servants, and assigns, to sue, labor, and travel for, in, and about the defence, safeguard, *and recovery of" the subject of insurance, "with- [765 out prejudice to this insurance, to the charges whereof we the insurers will contribute." And the object of this is to encourage and induce the assured to exert themselves, and therefore the insurers bind themselves to pay in proportion any expense incurred, whenever such expense is reasonably incurred for the preservation of the thing from loss, in consequence of the efforts of the assured or their agents. It is all one whether the labor is by the assured or their agents themselves, or by persons whom they have hired for the purpose, but the object was to encourage exertion on the part of the assured; not to provide an additional remedy for the recovery, by the assured, of indemnity for a loss which was, by the maritime law, a consequence of the peril. In some cases the agents of the assured hire persons to render services on the terms that they shall be paid for their work and labor, and thus obviate the necessity of incurring the much heavier charge which would be incurred if the same services were rendered by salvors, who are to be paid * nothing in case of failure, and a large remuneration proportional to the value of what is saved in the event of success. I do not say that such hire may not come within the suing and laboring clause. But that is not this case. The owners of the Texas did the labor here, not as agents of the assured, and being to be paid by them wages for their labor, but as salvors acting on the maritime law, which, as explained by Lord Chief Justice Eyre in *Nicholson v. Chapman* (¹), already cited, gives them a claim against the property saved by their exertions, and a lien on it, and that quite independently of whether there is an insurance or not; or whether, if there be a policy of insurance, it contains the suing and laboring clause or not. The amount of such salvage occasioned by a peril has always been recovered, without dispute, under an averment that there was a loss by that peril; see *Cary v. King* (²); and I have not been able to find any case in which it was recovered under a count for suing and laboring. I do not much rely on this, for it is very likely that such counts often were in the declaration, and that therefore no inquiry was made whether the loss was recoverable under one count or another; but at least there is no authority for

(¹) 2 H. Bl., at p. 257.

(²) Cas. t. Hardw., 804.

766] the *position that salvage (properly so called) was recoverable under that count.

There have been very few cases in our courts in which it has become necessary to discuss the nature of the suing and laboring clause. *Kidston v. The Marine Insurance* (1) is, I think, the only one in which there has been a recovery under it. There, however, all the extra labor was directly and voluntarily employed by the agents of the assured; and the charges were paid by them in consequence of this employment. In the very able and elaborate judgment of Mr. Justice Willes not a word can be found to countenance this extension of the construction of the clause beyond what seems to me both its language and its object; and, except the passage introduced for the first time into Arnould by the present editor, I can find nothing in any text-book tending to support it. I therefore think that the judgment of the Court of Appeal should be reversed and that of the Queen's Bench Division restored.

As there are cross appeals and neither party is completely successful, I should say that there should be no costs of either party either in the Court of Appeal or in this House, and that the respondents should have only the costs in the Queen's Bench Division as given by that judgment. I beg to move your Lordships to that effect.

THE LORD CHANCELLOR (Earl Cairns): My Lords, I have had the advantage of reading the observations which my noble and learned friend has just made in this case, and, concurring as I do entirely in the view which he has taken, I do not think it necessary to travel over the same ground again.

I will only make one observation with regard to salvage expenses. It appears to me to be quite clear that if any expenses were to be recoverable under the suing and laboring clause, they must be expenses assessed upon the *quantum meruit* principle. Now salvage expenses are not assessed upon the *quantum meruit* principle; they are assessed upon the general principle of maritime law, which gives to the 767] persons who bring in the ship a sum quite *out of proportion to the actual expense incurred and the actual service rendered, the largeness of the sum being based upon this consideration—that if the effort to save the ship (however laborious in itself, and dangerous in its circumstances) had not been successful, nothing whatever would have been paid. If the payment were to be assessed and made under the suing and laboring clause, it would be payment for ser-

(1) Law Rep., 1 C. P., 535.

vice rendered, whether the service had succeeded in bringing the ship into port or not.

Now it may be said that that only goes to the amount sought to be recovered, but it appears to me to go farther, and to go to the very principle upon which the attempt is made to recover the amount in question. It shows that the salvage expenses were not expenses incurred under the suing and laboring clause by the owner of the ship, but were a payment which the ship, as an actual chattel, had to submit to by maritime law, and would be obliged to make good in proceedings against the ship *in rem*.

My Lords, as regards the order which this House should be asked to make, I wish to point out to your Lordships that in the Court of Appeal there were, an appeal and a cross-appeal against the decision of the Queen's Bench Division. There was an appeal by the underwriters, upon the ground that they ought not to have been made to pay the whole sum insured; and there was a cross-appeal by the shipowner in respect of these salvage expenses, which the Queen's Bench Division had not allowed. The appeal by the underwriters was dismissed with costs, and that decision appears to me to have been perfectly right. The cross-appeal by the shipowner in respect of salvage expenses succeeded, with costs, in the Court of Appeal. Your Lordships, I think, will reverse that decision, and of course that would dispose of the costs as to that cross-appeal. Then, inasmuch as there is only one appeal before this House—the appeal by the underwriters, who complain now both of the determination which has made them pay the 100 per cent., the full insurance, and also of that which has made them pay the salvage expenses; and as they will succeed, as I should think, upon one of those points, and fail upon the other, your Lordships will, I assume, think it right that there should be no costs of the appeal to this House. Therefore, what I should propose to your Lordships [768 would be, that the judgment of the Court of Appeal, in so far as it varied the judgment of the Queen's Bench Division, should be reversed; that the judgment of the Court of Appeal, in so far as it dismissed the appellant's appeal against the judgment of the Queen's Bench Division, be affirmed; and that your Lordships should declare that the cross-appeal to the Court of Appeal ought to have been dismissed with costs, and order costs to be paid accordingly; and that there should be no costs of the appeal to this House.

LORD HATHERLEY: My Lords, I only desire to say that I entirely concur in the opinions which have been expressed

by my noble and learned friends. I have had an opportunity of perusing the opinion which has just been delivered by my noble and learned friend opposite (Lord Blackburn,) and having read it carefully, I may say that upon both the points of the appeal upon which he has touched I concur in the view he has taken, namely, that it is very clear that the damage done extends to 100 per cent., that is to say, extends to the whole amount of the money insured; and that it is equally clear, as it seems to me, that the suing and laboring clause was inserted by the underwriters for the purpose of securing the benefit of any pains that the shipowner might be inclined to take in preserving, for their benefit, as much as he possibly could preserve. But that does not apply to a case like the present, where the salvage seems to have been an ordinary sort of salvage, namely, a ship perceiving another at a distance and in a state of distress comes to the rescue, no bargain being made. We were expressly told in the case that no bargain was made as to any remuneration which should be given, but it was rescued upon the simple and common principle of salvage. There does not appear to be any authority showing it to be a case coming within the suing and laboring clause. I think, therefore, that the separation of the two points has been correctly made, and that your Lordships should concur on the one point in the judgment pronounced by both the courts below, and on the other point in the judgment pronounced by the Queen's Bench Division, as distinguished from that pronounced by the Court of Appeal.

769] *LORD O'HAGAN: My Lords, I also have had the advantage of perusing the very careful and exhaustive opinion which has been read by my noble and learned friend (Lord Blackburn). I entirely concur in the substance of that opinion, and I feel that I could add nothing of material value to the reasonings and conclusions it has so well expressed.

I have had some grave doubts as to the second point with reference to the operation of the suing and laboring clause, but upon the whole I do not see sufficient reason to differ from the views which have been adopted by your Lordships.

Ordered :—That the judgment of the Court of Appeal in so far as it varied the judgment of the Queen's Bench Division be reversed.

That the judgment of the Court of Appeal in so far as it dismissed the appellant's appeal against the judgment of the Queen's Bench Division be affirmed.

Declared that the cross-appeal to the Court of Appeal ought to have been dismissed with costs; costs ordered to be paid accordingly.

No costs of appeal to this House.

Lord's Journals, 31st July, 1879.

Solicitors for appellants: *Walton, Bubb & Walton.*

Solicitors for respondent: *Hollams, Son & Coward.*

[4 Appeal Cases, 770.]

H.L. (Sc.), June 19, 1879.

[HOUSE OF LORDS.]

*THE LORD ADVOCATE AND THE TRUSTEES OF THE [770
CLYDE NAVIGATION, *Appellants*; LORD BLANTYRE and
Another, *Respondents* ⁽¹⁾.

Property in Foreshore—Navigable Tidal River Boundary of Lands—Barony Titles containing no Express Grant of Foreshore followed by Prescriptive Acts of Possession.

Parties holding barony titles to lands situated on both sides of the Clyde, a navigable tidal river, claimed, as against the Crown and the Clyde Navigation trustees, that the foreshores *ex adverso* their lands belonged in property to them, subject to such rights of navigation or other rights which the public and the Clyde trustees might have over the same. The barony titles contained no express grant of foreshore, nor did they contain any specific boundaries which could be held to include the foreshore. The parties rested their claim on the grounds (1) that the barony titles alone gave them the property; (2) that coupled with their titles they had exercised from time immemorial acts of possession over the foreshore:

Held, affirming the decision of the court below, that the acts of possession for the prescriptive period having been proved, and following on barony titles to lands so situated, they constituted a right of property in the foreshore.

Held, also, that in this case it was not necessary to decide the question whether a barony title to lands so situated, which does not specify the exact boundary of the lands or contain any express grant of foreshore, could alone give a right of property in the foreshore.

See Lord Blackburn's opinion (p. 791), as to the weight of each act of possession, as evidence.

Agnew v. Lord Advocate (Court Sess. Cas., 8d Series, vol. xi, p. 309) commented on.

THIS was an appeal against a decision of the First Division of the Court of Session, Scotland.

The only point seriously argued before the House was whether certain alleged immemorial acts of possession exercised over a great extent of foreshore had been sufficiently proved. The facts and evidence in the case are so fully given in the opinions of the Law Peers, and in Lord Curriehill's note, that only a very brief statement is necessary here.

The action was originally raised by the respondents, Lord

(1) Affirming 15 Scot. L. Repr., 382.

Blantyre, and his son, the master of Blantyre, for a declarator that the ground forming the shores and banks of the river Clyde between high and low water mark *ex adverso* 771] their barony of Erskine, which *includes the lands of Bishopston and North Barr, Renfrewshire, situated on the south side of the river; and of their baronies of Kilpatrick, Dalnottar, and Colquhoun, which include the lands of Shorepark, and Glenaribuck, Dumbartonshire, situated on the north side of the river, belonged in property to them as pertinents of their adjoining lands, but subject to any rights of navigation or other rights which the public might have over the same; and also subject to any statutory rights conferred upon the trustees of the Clyde Navigation.

Lord Blantyre's lands extend for about five miles along the south side and about two along the north side of the river, which here forms part of what is known as the estuary of the Clyde, being about twelve miles below the city of Glasgow. The extent of foreshore claimed is about 750 acres.

The action was originally directed against the Lord Advocate, as representing the Commissioners of Woods and Forests under 20 & 21 Vict. c. 44; but the trustees of the Clyde Navigation were subsequently made parties as defenders in the court below.

The respondents' barony titles for the most part flow direct from the Crown, but do not specify the boundaries either of the baronies or of the component parts thereof.

The respondents founded their claim to the foreshore: (1.) In virtue of their titles of barony alone; and (2.) In respect of their titles coupled with acts of possession exercised from time immemorial by them and their predecessors upon the foreshore. The acts of possession relied on by them were, *inter alia*, the pasturing of cattle on the sea greens, the regular cutting of reeds and sea-weeds, in taking sand and stones for building purposes; and the granting permission to others to do so. They had also repeatedly prevented by legal process persons from removing sand and stones without permission; and had excluded the public from the foreshore. In fact they alleged they had used or permitted its use, and that on both sides of the river, for all the purposes for which ground of this description can be used.

The Clyde trustees insisted that the property of the ground claimed was vested in them by acts of Parliament. The Lord Advocate, while he averred on record "that the respective rights and interests of the Crown and the trustees 772] have never been judicially *ascertained, but that he

did not admit that the full right of property had been transferred to the trustees," in other respects stated indetical pleas with those of the Clyde trustees, and equally with them disputed the respondents' rights of property in this portion of the foreshore.

There was no controversy with regard to any rights of, or incident to, navigation, or with regard to any of the other rights of the public in connection with the shore of a navigable tidal river.

A proof of the averments of the parties having been allowed, the Lord Ordinary (') sustained the second ground

(') Lord Curriehill (the Lord Ordinary) in his note says:—

(1). *As to the titles of the pursuers, the respondents.*—The whole of the lands belonging to the pursuers, the foreshores of which are claimed by them in this action, are *de facto* bounded by the river Clyde, and they are for the most part held under barony titles flowing directly from the Crown, which, however, do not specify the boundaries either of the baronies or of the component parts thereof. The present barony of Erskine, which contains the whole of the pursuers' lands on the Clyde except the lands of Shorepark and of Glenarbuck, is composed of three more ancient baronies, namely, the old barony of Erskine, the barony of Dunnottar or Dalnottar, and the barony of Kilpatrick, all of which were united into the new barony of Erskine in 1664, by a Crown charter in favor of William Hamilton of Orbiston.

"The old barony of Erskine, which lies on the south side of the Clyde, was a barony prior to 1620, and was in that year confirmed by Charles, the Prince of Scotland, in favor of John, Earl of Mar, and his heirs male and assignees whomsoever, by a charter of confirmation and novodamus, by which that old barony, with the east and west ferries of Erskine and Dumbarton, and the lands of Barne, Barnehills, and Aulands, all in the county of Renfrew, were of new erected and united into a barony, to be called the barony of Erskine. The baronies both of Dalnottar and of Kilpatrick, which, as has been mentioned, were united in 1664 with the old barony of Erskine, and now form the existing barony of that name, lie on the north bank of the Clyde, op-

posite the policies of Erskine House. This new barony of Erskine was on the 21st of September, 1708, conveyed by the said William Hamilton of Orbiston to trustees for the purpose of being entailed on the master of Blantyre and the heirs therein named. Certain parts of the barony, however, on both sides of the river had been sold or feued to third parties; but it is unnecessary to specify them particularly, because they have all been reacquired by the pursuer, Lord Blantyre. In the conveyances of several of these subjects, the lands are expressly described as being bounded by the river Clyde; but in a question with the Crown such a description cannot, unless followed by prescriptive possession, be held as having divested the Crown of the foreshores, if the original barony titles do not imply such divestiture. The present question must, therefore, as to these lands be decided upon the construction of the general barony title. The pursuer, Lord Blantyre, is now infeft in the whole property originally comprehended in the separate baronies of Erskine, Dalnottar, and Kirkpatrick or Kilpatrick, and now contained in the new barony of Erskine erected in 1664, all of which were in 1831 united with certain lands in East Lothian into a new barony called the lordship and barony of Lennoxlove.

"Whether the lands of Shorepark were ever part of any of these baronies does not very clearly appear, although I think it is not improbable that they formed part of the barony of Kirkpatrick. They are of small extent and no special question was raised by either party regarding them at the discussion; and as to them, I think it clear

773] of claim of *the respondents, finding that they had succeeded in proving acts of possession of a character, and 774] extending over a length of time, *sufficient to estab-

that their extent must be ascertained by the proof of possession.

"The lands of Glenaribuck, which form the westmost portion of the pursuers' lands on the north bank of the Clyde, are part of the barony of Colquhoun. They were formerly known as the lands of 'Spittal,' but they were in 1845 conveyed to the late Lady Blantyre and the pursuer—Lord Blantyre—in life-rent for their respective life-rent uses alienably, and to and in favor of the heirs of the marriage between them in fee, as 'the lands of Spittal Cunningham, now called Glenaribuck, extending to a 20a. land of old extent, with the fishing thereof, called the Spittal shot, in the water of Clyde, together with the mansion houses and offices, the inn at Bowling Bay, offices and pertinents, and all other houses, buildings, parts, pendicles, and pertinents thereto belonging.' These lands are, like the greater part of the pursuers' lands, held under a barony title.

"There is no longer any doubt, if such ever existed, that the foreshore of the sea and of navigable rivers, though belonging to the Crown, subject to certain public uses connected with navigation and the like, are nevertheless alienable by the Crown subject to such public uses. Such alienation may be made by express grant, or by a conveyance of land expressing the boundary to be the sea or river, or by a grant with parts and pertinents silent as to boundaries, but explained by possession to include the foreshore. And a grant of barony followed by possession has the like effect. But the pursuer, Lord Blantyre, maintains that in virtue of his barony titles alone the foreshores and banks of the Clyde belong to him as pertinents of the barony, and that the grant of barony entitles him, without proving any possession, to follow the Clyde and appropriate its foreshores and banks, subject always to the rights of the public and of the Clyde trustees.

"This is a question of general importance, upon which at various times opposite opinions have been expressed by judges and institutional writers of

great eminence and authority, but which it has not hitherto been in any reported case found necessary to dispose of by judicial decision. And in the view which I am inclined to take of the present case generally, it is not necessary to pronounce any formal judgment upon the point. As, however, the parties are all desirous that an opinion should be expressed upon the point, I shall content myself by saying that I must regard the question as practically settled by the opinions delivered by the judges of the Second Division in the recent case of *Agnew v. Lord Advocate* (21st January, 1873, 11 Macph. 309). In that case the court decided that the pursuer Sir A. Agnew, whose title was a barony title in which no boundaries were specified, had right to the foreshore of his lands, which were *de facto* bounded by the sea, in virtue of his titles and of the possession which had followed; but the judges were unanimous in holding, although they did not make it matter of judgment, that without the proof of possession they could not have sustained the barony title alone as a sufficient title to the foreshore. The Lord Justice Clerk stated it to be his clear opinion that as Sir Andrew Agnew's titles 'contain no specific description of the component parts of the lands conveyed, and as no specific boundary of the barony or lands is expressed in them, the extent of the barony and lands can only be determined by the state of possession.' The other judges expressed similar views—and although an appeal was presented against the judgment to the House of Lords by the Lord Advocate, it was abandoned, and the opinion of the court must therefore be held as an authoritative statement of the law.

"This being so, I am of opinion that the pursuers' claim to the property of the foreshore as belonging to them in virtue of their titles alone, cannot be sustained.

("II.) *As to the possession which has followed upon the pursuers' titles.*—They maintain that they have established by the proof that they and their

lish in them the property of the foreshores of the Clyde *ex adverso* of all their lands on both sides of the river, as belonging *to them in property as pertinents of their [775

predecessors have had possession of the foreshores on both sides of the river along their whole property, of such a character and for such a length of time, as to show that the undefined grant of barony really included the foreshores in question. The proof clearly establishes, that from time immemorial Lord Blantyre and his predecessors have exercised upon the foreshores in question on both sides of the river nearly every conceivable right which an undoubted proprietor could have exercised. They have regularly, themselves or by their tenants, used for pasturing their cattle those portions of the foreshore which though covered at high water produced grass available for pasture. They have regularly cut the reeds which grew on the foreshore, and used the same for thatching and other purposes; and, until the supply failed, owing to the pollution of the water, they regularly cut the sea-weed which grew upon the foreshores, and carried off that ware as well as the drift ware for the purpose of manuring their lands. They have also carried away large quantities of sand and stones from the foreshore, and used the same for building houses and walls and forming roads upon the estate, and in particular, some thousands of cartloads of sand were taken for the construction of the new mansion house of Erskine, the building of which was begun in 1824 and was not finished till 1835 or later, and for the formation of an approach to the new house. During the same period also, the rubbish and *debris* from the foundation of the new mansion house and from the ruins of the old, were deposited in large quantities upon the foreshores of the policy grounds, and upon that great quantities of sand and soil dredged from the bed of the river have been at the request or with the permission of Lord Blantyre and his predecessors deposited on the foreshores, whereby the surface has been elevated above the level of high water, and has long been used as an addition to the arable or grazing ground of the estate. Similar operations have from time to time been performed on other parts of

the foreshore on both sides of the river, whereby a considerable extent of ground has been reclaimed. Then above Erskine ferry on the south side of the river, and above and below that ferry on the north side, wharfs and harbors have been made upon the foreshores by Lord Blantyre and his predecessors. They have also been in use to grant permission to third parties to take away sand and gravel from the foreshore, and they have also repeatedly prevented, and by legal process have interdicted, many persons from removing such materials without their permission. They have also run fences across the foreshore in continuation of the boundaries of the several farms, so as to confine the stock on one farm to the pasturage on the foreshore opposite the same; and they have, with sand, gravel, and stones, taken from the foreshore, made extensive embankments along the margin of the river. They have also been in use regularly to shoot and fish upon the foreshores, to beach boats and land cargoes on the foreshore, and to do many other similar acts. They have also excluded the public from the foreshore, and indeed for many miles no access to the foreshore can be had except through the pursuers' policy grounds. Now, none of these acts of possession, which, as I have said have been carried on for time immemorial (some of them having been proved to have taken place during last century), have ever been objected to or interfered with by the Clyde trustees, the Crown, or by any other persons.

"These acts of possession are not of the nature of a servitude, as the defenders maintained them to be, and they can be attributed only to the exercise of a right of property. Had the possession been confined to acts of one particular kind, such as merely pasturing cattle or taking sea-weed, it might possibly have not been sufficient as an assertion of a right of property; but the various acts of possession above enumerated really seem to embrace every use of the subject of which it was capable, many of them involving the removal of the substance of the

lands under their titles thereto. On a reclaiming note the First Division adhered to the Lord Ordinary's interlocutor⁽¹⁾. 776) *On appeal, *The Lord Advocate* (Rt. Hon. W. Wat-

ground, and the conversion of the waste, muddy, or slimy surface into cultivated land. And unless the Crown or the Clyde trustees can establish that there has been divided possession, or such an interference with the actual possession of the pursuers and their predecessors as to deprive it of the character of exclusive possession, I think it must be held that the pursuers have established their claim to the property of the foreshores. It is therefore necessary to examine the grounds on which the several defenders maintain that the possession of Lord Blantyre and his predecessors has not been that of proprietors.

"Had the present question been one merely between the pursuers and the Crown, I should have had no difficulty in sustaining the claim of the pursuers—(1) because the Lord Advocate has not succeeded in showing that the possessions of the pursuers and their predecessors has ever been interfered with; and (2) because the reservation with which the conclusions of the summons is qualified is amply sufficient to protect the interests of the public in the foreshores, and deprives the Crown of any interest to maintain that it has not been divested of these foreshores in favor of the pursuers. The appearance of the Clyde trustees, however, in the proceedings, and the claims which they have put forward, undoubtedly complicate the case, and introduce an element of difficulty into the present question. These trustees maintain, not indeed in their pleas in law, but in their statement of facts,—and they have led proof in support of their contention,—that in virtue of sundry royal charters and acts of Parliament they "became vested, for the purposes referred to in the foresaid charters and statutes, in, *inter alia*, the right of property in the ground forming the shores and banks of the river Clyde between high and low water mark *ex adverso* of what are now the pursuers' lands;" and they also allege that, under and in virtue of the said royal charters and statutes, they and their prede-

cessors have for greatly more than the prescriptive period possessed and used the said ground as their property. In particular, they allege that they have been in the habit of digging and removing sand, stones, and gravel from the said ground, and that they have also been in the practice of preventing others from removing sand, stones, and gravel therefrom, and have caused parties who removed such material without their authority to be prosecuted; that they have from time to time erected and maintained thereon embankments, dykes and other erections; and that they have also from time to time laid upon the said ground the soil and other material, or part thereof, obtained by them in dredging and widening the channel of the river.

"It will thus be seen that the Clyde trustees, like the pursuers, maintain that they have the property of the foreshores, first in virtue of their titles, and *separately* in virtue of their titles and the possession which has followed thereon. It is therefore necessary to examine with some minuteness the separate grounds on which this claim of property is put forward by the Clyde trustees.

"(III.) *The Title of the Clyde Trustees*.—These defenders (now appellants) found, in the first instance, upon a charter of King Charles I, dated the 16th of October, 1636, in favor of the provost, bailies, dean of guild, treasurer, councillors, and community of the burgh and city of Glasgow, which proceeds on many considerations, and, *inter alia*, on the following, viz.: 'Ac intelligentes etiam prepositum ballivos consules et communitatem dicti burgi nostri et civitatis de Glasgiew non pauca egregia opera suscepisse magnosque sumptus et impensas hinc multis annis elapsis impendisse reddendo fluvium Glotte *lie river of Clyde*, super quo dicta civitas fundata et situata est pro navibus cimbis et naviculis alisque vasis ad importandum et exportandum internas et externas commoditates navigabilem summo nostrorum liegiorum solatio ibi habitantium et ad dictas

(1) Scottish Law Rep., vol. xv, p. 382.

son), Mr. *Benjamin*, Q.C., and Mr. *Marten*, Q.C., for the appellants, denied that the *respondents' titles conferred [777 the right to the property in the foreshore, but reserved their

bondas et vice-comitatus eidem proxime adjacentes venientium.' The charter then confirms and grants to the burgh and magistrates, *inter alia*, 'etiam libertatem usum et possessionem quam predictus burgus noster de Glasgow et magistratus ejusdem habuerunt eligendi unum ballivum qui aque preest *lie ane water bailie* infra dictum fluvium de Clyde ubi mare fluit et refluit et infra integras bondas ejusdem subtus Pontem de Glasgow ad *lie Colchistane* et corrigendi omnes injurias et enormitates super dicto fluvio commissas infra bondas ejusdem.' Then there is a grant to the provost, bailies, &c., of 'Totum et integrum dictum burgum nostrum et civitatem de Glasgow cum omnibus et singulis terris domibus edificiis tenementis... lacubus torrentibus... ripis saxis salmonum piscariis aliisque piscationibus in dicta aqua et fluvio de Clyde... una cum omnibus aliis privilegiis et immunitatibus quibuscunque tam ecclesiasticis quam secularibus eisdem spectantibus jacentibus infra predictum burgum libertatem territorium et jurisdictionem ejusdem; ac cum libertate dicti fluvii de Clyde ex utroque latere a Ponte de Glasgow ad *lie Colchistane* nec non cum libertate et immunitate navium stationum *lie of the readis of Inschegreine, Newark, Pot of the rig* vel alicujus alterius navium stationis infra dictum fluvium de Clyde inter Pontem de Glasgow et *lie Colchistane* predictum pro onerando et exonerando mercimonia et bona ad dictum burgum,' &c. Then follows a new erection of the burgh 'in unum liberum burgum regalem cum omnibus et singulis libertatibus privilegiis immunitatibus et jurisdictionibus que de jure et regni nostri consuetudine pertinebant pertinent aut juste pertinere poterint ad aliquem liberum burgum regalem.' And then follows the following grant, upon which a considerable part of the argument for the Glasgow trustees was founded: 'Damus et concedimus liberam potestatem libertatem et privilegium prefato nostro burgo de Glasgow burgensibus et inhabitantibus ejusdem negociandi *to lie tred et traffique* vendendi et mercimonia faciendi infra omnes partes dicti fluvii

et aque de Clyde cum extraneis omnibusque aliisque personis ibidem venientibus et reparantibus et edificandi portus et navium stationes propugnacula et *lie gittieheidis* ad reddendum dictum fluvium magis navigabilem infra integras bondas dicti fluvii a dicte Ponte de Glasgow ad *lie de Clochstane* et ad recipiendum eorum naves cymbas et naviculas infra bondas dicti fluvii in quantum estus maximus *lie spring-tyde* fluit; et capiendum lapides et arenam infra aliquam partem dicti fluvii in quantum dictus estus maximus fluit, ad construendum propugnacula portus navium stationes et *lie gittieheidis* et ad reparandum et emendandum eadem et cum eisdem naves suas cymbas, naviculas aliaque vasa saburrandum; una etiam cum potestate et privilegio ipsis exigendi, petendi et levandi anchoragia et *lie schoir silver* aliasque devorias omnium mercimoniorum cymarum navicularum aliorumque vasorum appellationum apud *lie Broomie Law* de Glasgow vel ad aliquam aliam partem infra dictum fluvium de Clyde secundum usum et consuetudinem.'

"The Clyde trustees maintain that, in virtue of this charter, the property of the banks and shores of the Clyde, from the bridge of Glasgow to the Clochstane, which are respectively far above and below the limits of the pursuers' land, was conveyed to the provost and magistrates of Glasgow, and that they, the Clyde trustees, have now vested in them all the rights conferred by that charter upon the magistrates. As to the interpretation of the charter, I am of opinion that the right of property on the shores and banks was not thereby conferred on the magistrates. The right of appointing a magistrate, called a water bailie, to prevent disorders taking place in the river, was undoubtedly conferred on the magistrates. Power also was given to them to maintain and improve the navigation of the river, and for that purpose to take sand and stones from any part of the river and to make bulwarks and jetty-heads, &c. They were also authorized to ballast their own vessels with material taken from the river, and to levy tolls on all ships using the river,

778] argument on this point until after the *respondents had been heard. On the question of fact, they contended that the necessary acts of possession for forty years over

and on goods exported and imported from or into the bounds in question. But the grant of such powers and privileges as these does not necessarily or naturally imply a grant of property in the foreshores. It is, in my opinion, nothing more than a grant of authority to the provost and magistrates of Glasgow to perform, for the purposes of navigation, all such acts upon the shores and banks of the river as the Crown itself might have done for similar purposes, and it merely constitutes a burden on the right of property in the foreshore to whomsoever these may belong. It may be that the Crown, though trustee for these public uses, might not have been bound to perform any such operations for the maintenance or improvement of the navigation, but it undoubtedly had power to do so; and even an express grant of the foreshore to an individual must always have been subject to a reservation—implied, if not expressed—of the right of the Crown, as trustee for the public, to maintain and regulate the navigation. And I do not think that it was incompetent for the Crown to delegate these powers to the burgh of Glasgow, as being deeply interested in the river.

“But it is to be observed that this power of taking sand and stone from the river—unlike all the other subjects and privileges conferred by the charter—is given, not to the provost, bailies, and council of the burgh at all, but to the burgh itself, and the burgesses and inhabitants thereof, as part of a general clause conferring upon these burgesses and inhabitants power, liberty, and privilege of trading in every part of the river and water of Clyde. Even, therefore, if the power and privileges of this charter were all transferred from the provost and magistrates to the Clyde trustees, I do not think that any right of property, either in the alveus of the Clyde or in the foreshores thereof, was by that charter conferred upon the provost and magistrates, or was capable of transmission to the Clyde trustees. But further, I am of opinion that the Clyde trustees have failed to connect themselves in any

way with that charter. They derive their existence solely from statutes which do not confer upon them any right to that charter. In either view of the case, therefore, it follows that the performance of any of the operations, or the exercise of any of the powers authorized or conferred upon the burgh of Glasgow by the charter in question, even if regularly carried on from 1636 to the present date, could not have the effect of giving to that community, or to the Clyde trustees, any right of property in the foreshores, or any higher right than the maintenance and protection of the public navigation; and, in particular, could not have the effect either of divesting the Crown of its radical right of property in the foreshore, or of interfering with any right to the foreshore conferred by the Crown upon the proprietor of the adjoining lands. And, accordingly, in the debate upon the proof, the counsel for the Lord Advocate expressly stated, in answer to a question put by myself, that the Crown held that no right of property in the foreshore has ever been vested in the provost and magistrates of Glasgow or in the Clyde trustees, either under the said charter or in any other way. On this branch of the case, therefore, I am of opinion (1) that the charter in question is not of itself a title to the property of the foreshores; and (2) that even if full possession had been enjoyed by the grantees of that charter and their successors, by the performance of all the operations authorized, and the exercise of all the powers conferred by it, the title is not one which, by such possession, could be explained to be, or converted into, a title of property. In short, the charter, so far as it may relate to the foreshores, was a mere grant of a power or faculty to perform certain operations on lands belonging to the Crown, or to a grantee of the Crown, for the maintenance and improvement of public navigation, and is something entirely different from a grant of lands which, by prescriptive possession of certain other lands not specified in the grant, but as parts or pertinents of the lands named, is held to have been in-

*the foreshores to give the property coupled with the [779 titles, as against the Crown, had not been exercised, or proved. Their argument and the evidence adduced on this point sufficiently appears *from the opinions of the [780

tended to include these unnamed lands as well as those expressly mentioned.

"The charter of 1636 being thus of little avail to the Clyde trustees in the present question, it is necessary to examine their alleged statutory title to the foreshore of the Clyde. The history of the legislation begins with the act 32 Geo. 2, c. 62 (1758), which conferred upon the magistrates and council of the City of Glasgow power to deepen and improve the Clyde from Dumbuck Ford (which is at the western extremity of Lord Blantyre's property) up to Glasgow Bridge, and to perform all necessary acts in and upon the bed and banks of the river for that purpose.

"For the precise terms of the statute reference is made to the act itself; but I may specially notice the 2d and 37th sections, which provide that the magistrates and council may open stone quarries and dig stones or other materials out of any waste or common ground lying near the said navigation, without paying anything for the same—they always filling up and levelling all holes or pits which should be thereby made; and in case sufficient materials could not be found in such waste or common ground, then it should be lawful for the magistrates and council to dig and gather such materials in, and carry the same out of, the grounds of any person or persons near the said navigation works (not being the ground whereon any houses stand, or garden, orchard, yard, planted walk or walks, or avenue to a house), where such materials could be found for effecting the purposes aforesaid, and for keeping the works in order and repair, the magistrates and council making reasonable satisfaction to the owners in the manner pointed out by the statute. Now it is very probable that, under the terms 'waste or common ground,' may be included the foreshores of the river, which, undoubtedly, are to a very considerable extent covered with stones, sand, or gravel and mud, and which, therefore, may properly be called waste ground. But the power to take away stones and

gravel therefrom, without paying anything for the same, does not confer upon the magistrates and council any right of property in the foreshore. Such a power would have been entirely unnecessary if the foreshores had been already conveyed to them by the charter of 1636; and the whole language of the statute seems to imply that all the operations contemplated, whether in *alveo* or in the shores and banks, were to be performed on the property of others, whether of the Crown or of subject proprietors, who were to be entitled to receive compensation except where the grounds were waste, in which case no compensation was to be claimable. I therefore think that the powers given to the magistrates and council, under this statute at all events, could not interfere with the right of property on the foreshore, whether vested in the Crown or a subject, and was merely a burden imposed upon the proprietor not only of the foreshore but also of the adjacent dry land, of submitting to some little inconvenience for the general public good.

"The Act of George II, was followed by other statutes conferring further and additional powers on the magistrates and council of Glasgow, for the purpose of improving and maintaining the navigation of the Clyde. It is unnecessary to specify the details of these statutes, because the powers conferred are substantially of the same kind as, though more extensive than, the powers conferred by the original act. The statutes referred to are—10 Geo. 3, c. 104 (1770); 49 Geo. 3, c. 74 (1809). It is only necessary to say that in all of these acts the rights of the proprietors of lands affected by any of the operations authorized are fully protected, the trustees being authorized to take or acquire land, or to execute works thereon, only on condition of making compensation for all ground taken or injured by them in the performance of their statutory duties.

"The next act, 6 Geo. 4, c. 117 (1825), is an important one—(1). Be-

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Lord Advocate v. Lord Blantyre.

H.L. (Sc.)

Law Peers (¹). [They commented on, *Agnew v. Lord Advocate* (²); *Attorney-General v. Chambers* (³); **Corporation of Hastings v. Ivall* (⁴); Stair, 2, 1, 5; 2, 3, 60; Erskine, 2, 6, 17; Bell's Prins. ss. 641-2; Craig's Feudal 782] Rights, *bk. 1, ch. 14, Dieg. 4; Charter to Burgh of

cause it for the first time associates with the magistrates and council persons not belonging to that body, as trustees for carrying into effect the purposes of the various statutes; and (2). Because it contains important restrictions upon the powers of the trustees as to executing works on the south side of the river, along the lands and estate of Erskine, from Erskine Ferry down to a point opposite Friskyhall. Sect. 4 provides that no works whatever are to be executed upon the banks at that part of the river without the consent in writing of the proprietor of these lands, so that even under their compulsory powers the trustees could not take any part of the foreshores at this part of the river. The claims of Lord Blantyre, and of all the other proprietors adjacent to the river, for compensation for ground taken, or for damage done, were fully protected by this act.

"The next act, 3 & 4 Vict. c. 118 (1840), is also of some importance. By it an entirely new body of trustees is intrusted with the execution of the Clyde acts. The trustees consist of fifteen members of the town council and other ten persons not members of that body, and they are authorized, for the purposes of the acts, and of the operations thereby sanctioned, 'to enter upon, take, occupy, and use the several respective lands, tenements, or other heritages, upon, through, or adjoining to which the same are intended to be made, carried, executed, or constructed within the boundaries or line of works delineated on the said map or plan, or within the limits of the after-mentioned deviation, indemnification being always made to the owners, lessees, and occupiers of such lands, tenements, or other heritages, in manner hereinafter provided, reserving always to the proprietors of lands adjacent to the said river all rights to soil or ground reserved to

them by the said recited acts, or this act, or other rights competent to them at common law, except in so far as the same may be affected by the provisions of this act.' In the notices which were served before the act was obtained, and in the schedule appended to the act, Lord Blantyre is designed as owner or reputed owner of the foreshore; and in the 45th section it is expressly enacted, with reference to the river opposite to Lord Blantyre's estate on the south side of the river, that as some of the provisions of the previous acts as to works on the channel, or on the banks of the river opposite to or along the lands of Erskine, were or might be held inconsistent with or restrictive of the powers or authorities now granted, the said provisions of the previous acts were repealed, and in lieu thereof it was provided that in executing the works along or opposite Lord Blantyre's property on the south side of the river, from Erskine Ferry westwards to the cross dyke opposite Friskyhall, no embankment or dyke should, without previous leave in writing from Lord Blantyre, or the proprietor of the estate for the time, be higher or of a greater height than the level therein specified; the power of the trustees to make jetties and dykes was taken away, except to a limited extent; all deviation of any kind from the lines laid down on the parliamentary plan was prohibited without the proprietor's written consent; and it was expressly provided, 'that it shall not be lawful for, nor in the power of, the said trustees to deposit any earth, soil, or other matter, raised, excavated, or dredged from the bed or channel of the said river, upon any land beyond or out of the channel, as hereby authorized to be formed within the space where Lord Blantyre's property adjoins the river, without leave in writing to that effect first had and obtained for such purposes

(¹) *Post*, p. 785.

(²) Court Sess. Cas., 3d Series, vol. xi, pp. 309, 324.

(³) 4 De G. & J., 55; 4 D. M. & G., 206.

(⁴) Law Rep., 19 Eq., 558.

Glasgow, 1636 ('); 32 Geo. 2, c. 62 (1758); 10 Geo. 3, c. 104 (1769); 49 Geo. 3, c. 74 * (1809); 6 Geo. 4, c. 117 [783 (1825)]; 3 & 4 Vict. c. 118 (1840); 21 & 22 Vict. c. 149 (1858): see also *Graham v. Peat* ('); *Scrabster Harbor Trustees* ('); *Baillie v. Hay* (').

from Lord Blantyre or his foreshaids.' Various other provisions are made as to boat access for the convenience of Lord Blantyre's property on both sides of the river, and for protection of his ferries. The compulsory powers of the acts could therefore not be employed by the trustees so far as that part of the estate of Erskine was concerned, and as regards the remainder of the estate, ground taken or injured must be paid for by the trustees.

"It is only necessary to add that, by sect. 124, it is provided that nothing in that or any previous acts should in any way prejudice the estate, right, title or interest of the Crown in the waterway, alveus or channel of the Clyde, or over any land, ground, or heritages then or previously forming or constituting part of the waterway, alveus, channel, or reclaimed or resumed, or to be reclaimed or resumed, by means of the works, matters, or things done, or to be done or performed, by the trustees in execution of and under the authority of the previous acts or of the said act. From the terms of this statute of 1840, it is plain that no right of property in the foreshore was conferred upon or recognized as existing in the Clyde trustees. On the contrary, if any right is recognized at all, it is the right of Lord Blantyre. Without attaching much importance to the schedule of owners and occupiers appended to the act, it is a somewhat significant fact, that whereas Lord Blantyre is entered in that schedule as the proprietor or reputed proprietor of the foreshores in question, neither the Clyde trustees nor the Lord Provost and magistrates of Glasgow were considered as possessing or even at claiming any right of property or interest of any kind in these foreshores, although they are repeatedly entered in the schedule as owners or reputed owners

and occupiers of various other subjects scheduled, some of them being described as 'part of the river bank lying open and waste.' Now, whatever the right of the Crown might have been, it is plain that, at all events prior to the date of this statute, neither the Clyde trustees nor the City of Glasgow had acquired any right to the property of these foreshores, and it is equally clear that no such right was conferred upon either of these bodies by this statute. On the contrary, if any inference whatever is to be drawn from the language of this statute as to the property of the foreshore, it is, that the property was regarded as belonging to Lord Blantyre.

"The whole of these statutes were repealed and consolidated by The Clyde Navigation Consolidation Act (1858), by which the management of the navigation was committed to a new body of trustees, twenty-five in number, who are declared to be a body corporate, consisting of the Lord Provost of Glasgow, and other nine members of the town council, and of other fifteen persons, representatives of the shipping, mercantile, and trading interests of Glasgow. By this act the whole undertaking, lands, tenements, works, plant, stock, goods, debts, money, and other property and effects whatsoever, heritable and movable, real and personal, belonging or owing to or held by the former Clyde trustees, subject to the existing debts, liabilities, engagements, contracts, obligations, statutory proceedings, and incumbrances affecting the same, was transferred to and vested in the new trustees. The statute substantially re-enacts the provisions of the previous acts, so far as still applicable, and confers on the trustees powers and privileges similar to those conferred on their predecessors. And the rights of all landowners are fully

(¹) See Lord Curriehill's note, *ante*, p. 776.

(²) 1 East, 244.

(³) Court Sess. Cas., 3d Series, vol. ii, p. 884.

(⁴) Court Sess. Cas., 3d Series, vol. iv, p. 625.

784] *Mr. *Herschell*, Q.C., and Mr. *Balfour* (of the Scotch bar), appeared for the respondents, but were not called upon to address the House (').

785] *The Law Peers having taken time to consider their judgment, delivered the following opinions:

protected—the 45th and other clauses of the act of 1840 in favor of the proprietor of the estate of Erskine being *verbatim* re-enacted; and in sect. 77, which requires the trustees to obtain the written consent of the Crown to the construction of certain works below the line of high-water mark, it is expressly provided 'that if the right of property of or on the shore shall legally belong to any person, such right shall not be prejudiced except so far as power to purchase the same is given by the recited act and this act.' This statute, therefore, like the previous acts, leaves the question of the property of the foreshore very much as before, with this material qualification, that it distinctly recognizes the fact that these shores may, to at least some extent, be found to belong to private individuals. But certainly there is nothing in this or in any of the prior statutes to countenance the claim of the Clyde trustees to the property of the foreshore, unless in so far as they may have purchased the same from the proprietors by voluntary agreement, or under their compulsory powers. For the rules according to which such statutes are to be construed, reference may be made to the case of *Milne-Horne v. Allan* (Court of Sess. Cas., 3d Series, vol. vi, p. 189).

"(IV.) *Alleged Acts of Possession by the Clyde Trustees*.—But although the Lord Advocate maintains that the property of the foreshores has not been vested in the Clyde trustees, but remains still with the Crown, both sets of defenders maintain that the possession which the Clyde trustees have had of the foreshores of the pursuers' lands

has rendered the possession of the pursuers and their predecessors a divided possession, and has deprived it of the exclusive character which is essential to explain their titles, as including a grant of the foreshores. And as the Lord Advocate maintains that the possession of the foreshores has been virtually delegated to the Clyde trustees by Parliament with the consent of the Crown, it may be desirable to examine in what the alleged acts of possession consist, although, as I have already said, I do not think that the operations authorized by any of the statutes, if carried out in terms of these acts, can be held to be inconsistent with the right of property being vested in the pursuers as fully as the property of any foreshore may be vested in any proprietor of lands adjoining a navigable river. The power to take stones from waste ground without compensation is merely a statutory burden imposed upon all proprietors of waste ground, whether foreshores or dry land, and cannot in any way derogate from the right of property in such waste grounds. But be this as it may, and bearing always in mind that the acts founded on by the defenders have all been done by the Clyde trustees, solely under the powers conferred upon them by the Legislature, for great and beneficial public purposes, let us inquire what these acts have truly been? Now, I can see no evidence whatever that either they or the magistrates of Glasgow have ever lifted any materials from the foreshore for any purpose connected with the navigation of the Clyde, except, perhaps, some sand for the formation of a bulwark to protect the banks

(') They cited in their printed case, *Bell's Prins.* (s. 2025; Act 1617, c. 13); *Lord Advocate v. Maclean* (23 May, 1866; 38 Scottish Jurist, 584). And *Stair*, 2, 1, 5; 2, 3, 60; *Erskine*, 2, 1, 5; 2, 6, 17; 2, 6, 18; *Bell's Prins.*, ss. 642, 643, 750, 739. And see also *Innes v. Downie* (27 May, 1807; *Hume's Dec.*, 552); *Campbell v. Brown* (18 Nov., 1813, *Fac. Coll.*, vol.

xvii, p. 444); *Boucher v. Cranford* (30 Nov., 1814, *Fac. Coll.*, vol. xviii, p. 64); *Macalister v. Campbell* (7 Feb., 1837, 15 *Shaw*, 490); *Paterson v. Marquis of Alton* (11 March, 1846; 8 D., 752); *Officers of State v. Smith* (4 March, 1846, 8 D., 711; 6 *Bell's Apps.*, 487); *Commissioners of Woods and Forests v. Gannell* (6 March, 1851; 13 D., 854).

LORD BLACKBURN: My Lords, the respondents sought, against the Lord Advocate as representing the Crown, to have it "found and declared, by *decree of the [786 Lords of our Council and Session, that the ground forming the shores and banks of the River Clyde, between high-

from being washed away by the tide. No doubt there are jetties of some antiquity running across the foreshore into the river bed, but these and most of the other embankments and similar erections made by the trustees appear to have been made not with stones taken from the shore, but with quarried stones. Then the construction of these jetties upon the foreshores does not affect the present question. It is proved that many of the jetties extend beyond the foreshores and above high-water mark and into dry ground admittedly belonging to Lord Blantyre. His predecessors having submitted, therefore, to the erection of these jetties upon the foreshore for the improvement of the navigation, can no more deprive him of any right which he may otherwise have had thereto than it can deprive him of his property in the dry land upon which they are partly built. But further, it clearly appears that Lord Blantyre and his predecessors had no interest to object to these jetties, but the contrary; because one great effect of them was, besides increasing the scour of the river, and tending to deepen its channel, to create accumulations of silt and soil upon the foreshores, whereby their level was raised and their surface became fitted for cultivation. That this was one great object of the jetties appears very clearly from the report of Mr. John Golborne, engineer, to the magistrates as to deepening of the Clyde, dated the 30th of November, 1768, where he says: 'When the river is confined to a proper breadth by jetties, the intermediate space will be filled up with sand carried down by the spates and the fits brought up by the tides, and become firm land.' And again, in a report by the same gentleman, dated the 7th of September, 1781, he says: 'It gave me great pleasure and satisfaction to find the general work in such good order and condition, and to observe that the spaces between many of the jetties were filled up and covered with grass, to the great emolument of the proprietors and advantage

of the river; for in proportion as the sides fill up and become land, the neap tides will rise higher, and the land floods being more confined, will act with greater force on the bottom, so that by lengthening the jetties in some parts and raising them in others, greater depth may be obtained.' If therefore such was the effect expected and intended by the construction of the jetties, it is not wonderful that the pursuers' predecessors not only did not object to, but welcomed their construction.

"In course of time, however, it was found that the formation of jetties without connecting walls parallel to the river's banks was not so advantageous to the navigation as had been expected. Connecting walls were accordingly formed under the power of the act of 1809 already referred to, after reports on the subject by the eminent engineers Mr. Telford and Mr. Rennie, from which it appears that it was intended and expected that the spaces behind the jetties and the parallel walls would gradually be filled up and become firm land.

"The other operations of the trustees, and of their predecessors, the magistrates, appear to have been all directed, not to appropriating and using the foreshore, but rather to the contraction of the channel or navigable bed of the river. This no doubt involved at some places, where the channel required straightening, the cutting away of some parts of the foreshore; but all such encroachments were, by the statutes which conferred the power to encroach, directed to be paid for to the proprietors.

"But it is said that, although in point of fact under the acts of 1840 and 1858, various parts of the foreshores of the pursuers' lands within the statutory lines laid down on the parliamentary plans have been dredged or cut away by the trustees, compensation has never been demanded by Lord Blantyre. I do not think that this is a circumstance of the slightest consequence. His Lord-

787] *water mark and low-water mark, including the space between high-water mark and the longitudinal walls or dykes which have been erected along or near to certain parts of the deepened channel of the said river, *ex adverso* of the estates of Erskine, Bishopton, and Northbar, in the

ship, no doubt, had been scheduled as owner of the foreshores, and he might have claimed compensation, but it was *res mera facultatis* in him to make the claim; and he probably was satisfied that the damage, if any, was so trivial, that it was not worth his while to claim compensation. But, in truth, it is evident from a long correspondence which took place between the Lord Provost of Glasgow and the engineers of the late and present Lord Blantyre, and the guardians of the latter during his minority, that the magistrates and council, while acting as trustees of the Clyde navigation, expressly recognized the right of Lord Blantyre, as proprietor of these foreshores, to the property of all accessions thereto which might be the result of the accumulation of soil caused by the operations of the trustees.

"But the Clyde trustees maintain that they have used the foreshores of the pursuers' land to the exclusion of the pursuers by depositing thereon materials dredged from the river. The pursuers' answer is, I think, conclusive, viz., that such deposits have all been made with the consent of Lord Blantyre and his predecessors, and could not have been made without such consent. In many cases Lord Blantyre and the Clyde trustees have made the deposit a joint act—the trustees depositing dredgings, and Lord Blantyre depositing rubbish and soil on the top of the elevated surface for the purpose and with the effect of making it available for pasture. But all this only shows that the acts of the trustees not only did not interfere with Lord Blantyre's possession of the foreshores or amount to joint possession, but was done with the express consent, and indeed at the request of, Lord Blantyre, for the improvement of his property, and could not have been done by the trustees upon any other footing. Indeed, in some instances in which the trustees asked in writing for Lord Blantyre's consent to their depositing dredgings upon the shores,

they expressly describe the ground as being 'Lord Blantyre's foreshore,' or 'your Lordship's foreshore.'

"The trustees further allege that they have prevented and even interdicted persons from taking sand from the foreshores. This is quite true; but it was done at the request of Lord Blantyre himself, who desired to be saved the expenses of such prosecutions himself, and who requested the trustees to put in force their statutory powers to prevent any interference by unauthorized persons with the banks of the river, and particularly with sand, which at Lord Blantyre's request they had deposited upon the shores and banks.

"It is in vain, therefore, for the defenders to maintain that any acts done by the Clyde trustees during the last 100 years upon these foreshores have been of such a character as to prevent the possession which Lord Blantyre and his predecessors are proved to have exercised for time immemorial from having the character of exclusive possession as proprietors. And on this branch of the case I am of opinion, not only that the defenders have failed to prove any acts of possession inconsistent with the full right of property being in Lord Blantyre, but that the pursuers have succeeded in proving acts of possession of a character and extending over a length of time sufficient to establish in them the property of the foreshores of the Clyde *ex adverso* of all their lands on both sides of that river, as belonging to them in property as pertinents of these lands under their titles thereto. It may be the case that no positive acts of possession have been exercised by Lord Blantyre and his predecessors upon every yard of shore fronting the river, but on ground of such extent it is obvious that minute proof of such possession could not be expected. I think the proof establishes that Lord Blantyre has substantially possessed the whole foreshores as his own property from time immemorial.

county of Renfrew, and *ex adverso* of Kilpatrick and Dalmottar, and of Shorepark and Glenarubuck, in the county of Dumbarton, belonging to the pursuers, belongs in property to the pursuers, and is part and pertinent of the adjoining lands, but subject always to any rights of navigation or other rights which the public may have over the same, and subject also to any rights conferred upon the trustees of the Clyde Navigation by their acts of Parliament." The river Clyde trustees were added as defenders (').

The pleas in law for the pursuers, the respondents, were two :

1. The shores and banks of the river Clyde, *ex adverso* of the lands and baronies libelled being the property of the pursuers by virtue of their titles, subject to the right of the Crown as trustee for public uses, the pursuers are entitled to decree in terms of the conclusion of the summons.
2. *Separatim*. The shores and banks libelled having been for time immemorial, or at least for forty years, possessed as their property by the pursuers and their predecessors, they are entitled to decree as concluded for.

The Lord Advocate and the Clyde trustees by their pleas in law traversed both of the pleas in law of the pursuers.

A great deal of evidence was led for the pursuers, the respondents, and some on behalf of the Clyde trustees. None was led by the Lord Advocate.

The interlocutor of the Lord Ordinary (Lord Curriehill), dated *the 18th of July, 1876, is appealed from. It [788 is in the following words :

The Lord Ordinary, having heard the counsel for the parties, and considered the closed record, proof, and whole process, finds that the pursuers, in virtue of their titles to

"The result is, that decree of declarator will be pronounced in favor of the pursuers in respect of the possession following on their titles, both sets of defenders being found liable in expenses. Of course, however, the decree will be qualified, in terms of the conclusion of the summons, by being given subject to the rights of the public as well as of the Clyde trustees under their various statutes.

"In conclusion, I have only to state that some evidence was produced by the Clyde trustees for the purpose of showing that, according to modern engineering notions, reclamation of the

foreshores by raising their levels is a mistake, and instead of being an advantage to the navigation will tend to diminish the flow of tidal water. That, however, is a question which does not arise in the present case. The pursuers do not ask in the present summons to have it found that they are entitled to reclaim the foreshore; but if they are proprietors of the foreshores they will be entitled to perform any operations upon them which will not interfere with the statutory rights of the Clyde trustees."

(¹) Jan. 15, 1876; Scot. Law Rep., vol. xiii, p. 218.

the lands libelled, and of the possession by the pursuers, and their predecessors and authors, under and in virtue of said titles for upwards of forty years before the commencement of the action, or from time immemorial, are proprietors of the foreshores of the River Clyde, *ex adverso* of said lands, but subject always to any rights of navigation or other rights which the public may have over the same, and subject also to any rights conferred upon the trustees of the Clyde Navigation by their acts of Parliament: Therefore finds, decerns, and declares in terms of the conclusions of the summons: Finds the defenders, and the trustees of the Clyde Navigation, who have compared as defenders, liable in expenses to the pursuers; appoints an account thereof to be lodged, and remits the same to the auditor to tax and to report.

Two interlocutors of the First Division of the Court of Session, dated respectively the 19th of December, 1877, and the 21st of February, 1878, are also appealed from. They are in the following words:

Edinburgh, 19th December, 1877.—The Lords having resumed consideration of the cause, with the additional proof taken by Lord Mure, and heard counsel thereon, and on the reclaiming note for the trustees of the Clyde Navigation and another against Lord Curriehill's interlocutor dated 18th of July, 1876, adhere to the said interlocutor and refuse the reclaiming note: Find the defender and the trustees of the Clyde Navigation liable in additional expenses, excepting therefrom the expenses occasioned by the allowance of additional proof: Allows an account of said expenses to be given in; and remits the same, when lodged to the auditor to tax and report.

Edinburgh, 21st February, 1878.—The Lords approve of the auditor's report on the account of expenses incurred by the pursuers, and decern against the defender, the Lord Advocate, and the trustees of the Clyde Navigation for payment to the pursuers of the sum of £526 12s. 9d. of taxed expenses.

The Lord Ordinary, in the note explanatory of the grounds of his judgment, entered very fully into the whole law on the subject and discussed at length and with great care the effect of the evidence led before him (¹).

It was contended by the appellants before the First Division that the small property of Glenarbuck, being held by a different title from the Barony of Erskine, the possession for

(¹) *Ante*, p. 547.

forty years *ex adverso* of it was not proved by that which went to prove possession *ex adverso* of the barony; and that, on taking the evidence before the Lord Ordinary, the evidence bearing on the one had not been *sufficiently [789] discriminated from the evidence bearing on the other. The Lords of Session therefore allowed the pursuers to lead additional evidence of the possession of the foreshore *ex adverso* of the lands of Glenaribuck by themselves and their predecessors, and to the defenders a conjunct probation. Additional evidence was led before Lord Mure both by the pursuers and by the Clyde trustees; and after this had been heard the second interlocutor appealed against was pronounced.

Lord Mure delivered an elaborate opinion, in which Lord Deas, Lord Shand, and the Lord President briefly expressed their concurrence.—Lord Mure said:

In dealing with such cases there are, as it appears to me, certain propositions in law which may now be assumed to be settled. The first is, that property in the foreshore is capable of being transferred by the Crown to a private proprietor. Secondly, that such property can only be alienated by the Crown, subject to and under reservation of any rights of navigation, or other rights, which the Crown, as representing the public, may have over it. Thirdly, that a Crown title, and more especially a barony title to property along the sea-shore or a tidal navigable river, when followed by possession of the foreshore, is sufficient to constitute a valid right of property in the foreshore, although the title does not contain any express grant of the shore, or any such specific and definite boundary as is by itself sufficient to instruct that the shore was intended to be conveyed. As to these three propositions I do not understand that there is any dispute between the parties. But there is another important question relative to such rights which has been raised, and as to which parties are directly at issue, viz., whether a barony title to property which does not contain an express grant of foreshore or any such specific boundary as can be held to include the foreshore, is of itself and without any proof of possession sufficient to confer that right.

The Lord Ordinary has stated in the note to his interlocutor that, in the view he takes of the present case, it is unnecessary to pronounce any formal judgment on this question as to the effect of a barony title; but as it appears that the parties were desirous that an opinion should be expressed upon the point, his Lordship has indicated his opinion that the question is practically settled in so far as this court is concerned by the decision in the case of *Agnew v. The Lord Advocate* ⁽¹⁾, and in that judgment I understand his Lordship to concur. I agree with the Lord Ordinary in thinking that the decision of this question is not necessary for the disposal of the present case; but, as it has been argued, more especially with reference to that portion of the pursuer's property called Glenaribuck, which was acquired by him in the year 1845, it may be right that I should state that, as at present advised, I should be disposed to hold that the judgment in the case of *Agnew* proceeds upon a sound view of the law applicable to that important question. I do not think it necessary to state at any length the *reasons which lead me to come to that conclusion. There have, no [790] doubt, been contradictory opinions upon that question by eminent judges; but I think that the result which the Second Division came to in the case of *Agnew*, upon an examination of all the authorities, was very shortly and distinctly expressed by Lord Benholme in his opinion, when he said that "where an estate in on the seashore, and held by titles which do not by express grant or specific

(1) Jan. 20, 1873; Court Sess. Cas., 3d Series, vol. xi, p. 809.

boundary extend the right of the proprietor beyond high-water mark, there is no presumption that the foreshore is a pertinent of the land." The question, therefore, which we have now to dispose of is, Whether Lord Blantyre's title, taken in connection with the proof of possession which has been had of the foreshore, is sufficient to entitle him to decree in terms of the conclusions of the summons?

My Lords, the Lord Advocate at your Lordships' bar pointed out that the decision against the Crown proceeded on the second plea in law; and that he had no case on appeal unless he could get rid of that decision. The respondents have in their case entered into an elaborate argument to show that their first plea in law was good. That the Lord Advocate denied, but he proposed to reserve what he had to say on that point till the reply, if it became necessary to decide that question. This course was approved of. The Lord Advocate further admitted that he was not prepared to deny that the three propositions stated by Lord Mure in the passage just read were accurate statements of the law of Scotland, and consequently that the question was, as stated by Lord Mure, whether Lord Blantyre's title, taken in connection with the proof of possession which has been had of the foreshore, is sufficient to entitle him to decree in the terms of the conclusion of the summons.

The Lord Advocate and Mr. Marten were accordingly heard on this part of the case, and urged all, I believe, that could be urged on behalf of their clients. At the conclusion of their argument your Lordships adjourned the further hearing of the appeal in order that you might determine whether it was necessary to hear the counsel for the respondents.

Your Lordships have the elaborate and very able opinions of Lord Curriehill (¹),—before whom one part of the oral evidence was heard,—and of Lord Mure (²), before whom the rest of the oral evidence was heard. Both of those learned persons agree in the result; and the other Lords of Session have agreed with them unanimously. My Lords, [791] it is not a light thing to draw from the *written notes of evidence a conclusion differing from that which was come to by those who heard the evidence given. If I did so it would be with doubt and diffidence; and I should not express such an opinion without much consideration and what seemed to me to be strong reasons. But in this case, after having carefully listened to all that was said at your Lordships' bar, and after having for myself examined the evidence, I must say, speaking for myself alone, that not only should I have come to the same conclusion as the Lords

(¹) *Ante*, p. 535.

(²) See *ante*, p. 525.

below, but that I should have found difficulty in affirming a contrary finding if it had been come to by them. I think that, if the burden of proof lay upon the respondents to prove possession of the foreshore for forty years, they have done so. I do not propose to enter into a detailed examination of the evidence. That has been already very fully, and to my mind, very satisfactorily done by Lords Curriehill and Mure. But I may make a few general observations arising on what was argued at your Lordships' bar.

The principal question is whether, on the whole, it is proved that Lord Blantyre and those who preceded him in the barony of Erskine have been for the last forty years in possession of the foreshore lying between the high-water mark and the low-water mark of the Clyde, a tidal navigable river *ex adverso* that barony. This is a tract of considerable extent, I think rather more than 700 acres.

Every act shown to have been done on any part of that tract by the barons or their agents which was not lawful unless the barons were owners of that spot on which it was done is evidence that they were in possession as owners of that spot on which it was done. No one such act is conclusive, and the weight of each act as evidence depends on the circumstances; one very important circumstance as to the weight being, whether the act was such and so done that those who were interested in disputing the ownership would be aware of it. And all that tends to prove possession as owners of parts of the tract tends to prove ownership of the whole tract; provided there is such a common character of locality as would raise a reasonable inference that if the barons possessed one part as owners they possessed the whole, the weight depending on the nature of the tract, what kind of possession could be *had of it, and what the [792 kind of possession proved was. This is what is very clearly explained by Lord Wensleydale (then Baron Parke) in *Jones v. Williams* ⁽¹⁾. And as the weight of evidence depends on rules of common sense, I apprehend that this is as much the law in a Scotch as in an English court. And the weight of the aggregate of many such pieces of evidence taken together is very much greater than the sum of the weight of each such piece of evidence taken separately.

Now, in the present case, there is a great volume of evidence of almost every kind of act of ownership. Some of them are, if they stood alone, not of great weight. Some are very weighty indeed. That which makes most impression on my mind is that, wherever throughout this whole

⁽¹⁾ 2 M. & W., 326, at p. 331.

tract any part of the foreshore has been elevated by the deposit of rubbish or soil so as to be raised above the level of the tide and turned into dry land, the land from which the water has been excluded has been taken possession of by the Barons of Erskine. I do not attach so much weight to acts of this sort done recently, one may say almost *post litem motam*, but I attach very much weight to what has been done both before the forty years and during the earlier part of the forty years, during which time everybody, including the Clyde trustees, seem to have assumed that the foreshore was the property of the Barons of Erskine. It was argued that, as the barons had an unquestionable right as riparian proprietors to have access to the water at high tide, even though the foreshore was still the property of the Crown, the Clyde trustees when depositing mud and shingle on the foreshore so as to shut them off from such access, did what, if not authorized by the statutes, would be an injury, if authorized, a matter for which they were entitled to compensation. That is true, but there was nothing to justify the Clyde trustees or any one else in making compensation to the barons for this injury by giving them the foreshore if it was the property of the Crown. If it was the property of the barons they were entitled to it, and it is perfectly intelligible that they did not ask for compensation from the Clyde trustees for doing that to their land which was really an improvement to it.

I may say that I think any evidence tending to show that 793] the *Clyde trustees acted as owners of this tract, or of any parts of it, would, in my mind, have been relevant as showing that they were, and consequently that the Barons of Erskine were not in possession, but, as far as I can perceive, every act done by the Clyde trustees is attributable to their statutable powers. The same remarks apply to the less important question whether the evidence proves that the owners of Glenaribuck have been for forty years in possession as owners of the foreshore *ex adverso* that smaller property.

It is not necessary to form any opinion on the question as to the first plea in law; and as the counsel for the respondents have not been heard on that question it would be improper to base the decision of this House on any such opinion even if one was formed. The authority of the case of *Agnew v. Lord Advocate* (1) is not either increased or shaken by what is now decided if your Lordships take the view of the evidence which I do.

(1) Jan. 20, 1873; 11 Macph., 309.

I should therefore propose that your Lordships do not call upon the respondents and affirm the interlocutors appealed against and dismiss the appeal with costs.

LORD HATHERLEY: My Lords, I adhere to the view taken by my noble and learned friend who has addressed the House as to the disposal of this case. The case has been argued with great ability, and at full length before your Lordships' House; but, when looked into, it really reduces itself simply and entirely to a question of fact.

Points of law are glanced at in the pleadings and also in the judgments of the learned Lords of Session who determined this case in the first instance, but they are glanced at to be summarily, and, as I think, justly disposed of by this remark, that supposing that that which might have been at one time a very much contested point, had arisen in this case it would have occasioned no difficulty; the point, namely, as to whether or not one who has had a grant of a barony not defining the exact boundary, and especially the exact river or sea boundary, with regard to the foreshore which forms the fronting portion of the land which he has acquired by the title of the grant of the barony, is obliged, *inasmuch as he cannot show by the charters them- [794
selves a definition of his property, to add to the grants contained in those charters a proof of possession of the foreshore in front of his own soil if he claims that foreshore. Whether or not *Agnew's Case* (') be correctly decided (as to which I cannot say that I entertain much doubt), I apprehend that your Lordships will not in this case be obliged to consider that question, or to deliberate as to that point which was raised and decided in *Agnew's Case* adversely to the owner, namely, that he cannot rest upon his paper title, if I may so call it, without proving possession of that foreshore which he claims in cases where the definition of it is not strictly and clearly contained in the charter itself. In those cases it may be very right and proper that the proof should be required to satisfy the court, and in order that that which is not *per se* clear should be made clear by the evidence of what has taken place under the title which has been acquired.

If that be so, as the learned judges in the court below observed, and as my noble and learned friend who has just addressed your Lordships has observed, it does appear to me really to be made out abundantly clearly in this case that these acts of ownership have been exercised along that portion of the sea shore to which the respondents on the present occasion have asserted their right. Lord Curriehill

(') Jan. 20, 1878; 11 Macph., 809.

has gone into the question of title as it appears upon the documents at full length and I shall not repeat his observations. No question has been raised with reference to the description of the property which is conveyed by the several charters. No doubt is raised that by virtue of the several charters Lord Blantyre and those who preceeded him acquired a title distinctly to a large space of territory, extending a long way down the river Clyde, and on each side of that river, a considerable portion of that territory passing under the names of the Barony of Erskine principally, and of the Barony of Glenarbut. The sea shore now in question forms approaches to that land, the title to which has been so acquired by means of grants of those baronies. The proof clearly establishes that.

I have listened to the argument upon the evidence very carefully, and I have very carefully read the evidence, and 795] it appears *to me that Lord Curriehill is perfectly accurate in what he considers to be established by the proof in the cause. He says: "The proof clearly establishes that from time immemorial Lord Blantyre and his predecessor have exercised upon the foreshores in question on both sides of the river nearly every conceivable right which an undoubted proprietor could have exercised. They have regularly, themselves or by their tenants, used for pasturing their cattle those portions of the foreshore which though covered at high water produced grass available for pasture." As to that, several witnesses were called, namely, the tenants occupying the lands in a portion of the district, who described the pasturing of their cattle upon the places in question along various parts of the foreshore. Then Lord Curriehill says: "They have regularly cut the reeds which grew on foreshore, and used the same for thatching and other purposes; and, until the supply failed owing to the pollution of the water, they regularly cut the sea-weed which grew upon the forshores, and carried off that ware" (it has been called sea "ware"), "as well as drift ware for the purpose of manuring their lands. They have also carried away large quantities of sand and stones from the foreshore, and used the same for building houses and walls and forming roads upon the estate." (This part I confess, struck me as very forcible evidence of an exercise of the right in question), "and in particular, some thousands of cartloads of sand were taken for the construction of the new mansion house of Erskine, the building of which was begun in 1824 and was not finished until 1835 or later, and for the formation of an approach to the new house. During the same

period also, the rubbish and *débris* from the foundation of the new mansion house and from the ruins of the old, were deposited in large quantities upon the foreshores of the policy grounds, and upon that great quantities of sand and soil dredged from the bed of the river have been at the request of or with the permission of Lord Blantyre and his predecessors deposited on the foreshores, whereby the surface has been elevated above the level of high water, and has been long used as an addition to the arable or grazing ground of the estate. Similar operations have from time to time been performed on other parts of the foreshore on both sides of the river, whereby a considerable extent of ground has *been reclaimed." I need not read any further. [796 What I have read is quite enough to show what in the opinion of Lord Curriehill was the result of the evidence.

Now the court below have been unanimous in their view of this evidence, and in particular Lord Mure, whose name has already been mentioned, has taken the same view as Lord Curriehill, going into some detail, but not quite to the same extent as Lord Curriehill has done. And there is one observation which I shall presently make with reference to the Clyde trustees which struck my mind as having some strength with regard to this evidence.

The corporation of the Clyde trustees are setting up rights under their act of Parliament upon the foreshore which they say they have exercised; and they say, further, that they have interfered with other persons exercising rights which they thought hostile to the rights exercised or exerciseable by them. The answer to that on the part of the respondents has been, True it may be that you have exercised rights upon the foreshore, and indeed upon part of our foreshore (if I may so express it on behalf of the respondents), but you have done nothing which you were not authorized to do by your act of Parliament; your act of Parliament may well have authorized those acts, and indeed the nature of the act itself, the object of which was to improve the navigation of the Clyde, almost required that you should be furnished with very considerable powers adversely to the proprietors of land, who either were heard when the act was before Parliament, or, if they were not so heard, thought that it was not necessary to interfere with the rights and powers which were being granted to the Clyde trustees.

But Lord Curriehill goes on to say—I do not quote his words, I merely state the effect and purport of his reasoning—that as regards the Crown itself the Crown would not

make a grant, and ought not to make a grant, of land except, subject to the rights vested in the Crown, to protect the river as trustee for the public in maintaining the navigation. The rights granted by Parliament would only be granted in the same way, and if the acts of the Clyde trustees and the clauses granting powers to those trustees be carefully scanned (they are elaborately set forth in Lord 797] *Curriehill's judgment) it will be seen that no right in the soil itself, no right of the soil, no possessory right is granted except for the purposes of the act, we find that there are a considerable number of powers granted materially interfering with the rights of proprietors as regards their own property as far as the protection of the river goes, but they are confined entirely to that particular purpose. I do not find that it is alleged in any portion of the documents before your Lordships, nor do I find in the evidence anything that proves that Parliament interfered with or forbade the respondents from exercising the rights which they claim adversely to the Clyde trustees; I mean adversely in this sense, as being the owners and proprietors of the land in question, and as being entitled to rights, not to coequal rights, that would be absurd, but to rights with them in the property. It was made subject to such powers and authority as would be necessary for the general purpose of the act, which general purpose was the improvement of the river Clyde, and so far as powers of interference were required for the purpose of improving the river they were granted; so far, and so far only, has Parliament interfered.

But there was another point which struck me, I confess, all through. The River Clyde Acts, and the rights and powers of the trustees and the modes in which they have exercised them, are all very strongly corroborative of the view that the respondent has acted within his rights in those things which he has done, because this is not a mere ordinary case of a person exercising rights in a property which perhaps may not interest a great number of people around him so as to induce them to interfere with the exercise of those rights. Part of the argument which has been addressed to us is that hardly anything has been done by Lord Blantyre which might not have been done without disturbing the repose and comfort of his neighbors or interfering with any other right which might call forth the interference of third parties. But, my Lords, here you have a standing body appointed by act of Parliament with certain powers to do certain things, some of which might have been done by the Crown, but besides that having certain higher

powers granted by Parliament with the sanction of the Crown.

They, having those powers conferred upon them, are on the spot, they can notice all that is going on, and they can, if *they will, step forward to prevent it. They [798 are a body with means and powers of every kind which would have enabled them, if they had thought fit, to interfere with this exercise of these acts of ownership, if I may so call them, on the part of the respondent and his predecessors. But we do not find any such steps taken by the Clyde trustees when that considerable interference with the foreshore was going forward for eleven years, when the respondent was removing large masses of sand, some thousands of cartloads it is said, from this foreshore itself. That, if anything, was a matter which ought to have called forth, and would have called forth, the interference of the Clyde trustees, who were always there and were able to protect themselves and to assert the right, if they had it, to interfere with such acts of ownership. But, my Lords, we find that no such step was taken by them. Those acts of ownership appear to have gone on, the respondent or his predecessors taking the sea-ware, pasturing their cattle on the foreshore, and taking the sea sand and removing it; all this was done within the cognizance and the jurisdiction of those who had ample means of interfering if they had thought proper to interfere. Nothing, however, was done in the way of interference, and I say that that is very strongly corroborative of the view that those acts of ownership were done in due pursuance of the authority conferred by the grant and the possession thus acquired on the part of the respondents or their predecessors.

In all cases, where there is such a grant as this, extending for several miles along a river, it is necessary for your Lordships to consider anxiously what the exact nature of the acts of ownership is. Now it is not merely one corner or one field which is shown to have been used as pasture for the cattle for two or three days, owing to some accidental occurrence, in connection with their going to a fair or the like; such casual exercises of the right are not the matter here in question. There seems to have been a regular exercise on the part of the respondent of the right of pasturing cattle in the manner described in the evidence just like any other proprietor on his own field; and this was a valuable right. So with the right of taking sea-ware. It appears from the evidence that owing to some alterations which were made in the river Clyde some years ago, the stones be-

799] came nearly bare and *the sea-ware ceased to be collected. But, as I understand the evidence, so long as there was any ware worth collecting it was collected by the tenants of the respondents. In short, as Lord Curriehill says in the judgment which has already been referred to so often, all the rights that possibly could be exercised were exercised by the respondent, either from time immemorial or for more than forty years, and thereby he fulfilled all the requisites of the *Agnew Case*, should that case ultimately be held, and at present I see no reason why it should not be held, to be sound law. The respondent, therefore, escapes from the stringency of that case by complying with the conditions which it imposes, namely, by showing that he had held possession of, as it appears to me, sufficiently large portions of the shore immediately in front of his lands, to justify your Lordships in coming to the conclusion that he is entitled to what he claims. It appears not to have been partial exercise at one particular spot or at one particular time, but a general exercise as often as he or his tenants thought fit of the right to do what they conceived themselves justified in doing by virtue of the title acquired by him.

I confess, my Lords, it appears to me that these acts of ownership justify your Lordships in coming to the conclusion to which the court below has come. I, for one, should be very loth and very slow to differ from the learned judges, who had an opportunity of hearing and examining the evidence, and whose decision if we interfered at all in this case we should have to reverse, since the case appears to me to depend upon the facts, by reason of our taking a different view of the facts from that which has been taken by those learned judges, and taken unanimously, in the court below. Apart, however, from that consideration, I have come to the same conclusion as to the facts with the most perfect acquiescence in the views which they have presented; and I therefore agree in the motion which has been proposed by my noble and learned friend.

LORD GORDON: My Lords, I have had an opportunity of seeing and considering the judgment which has been delivered by my noble and learned friend Lord Blackburn, and as I concur in it, and also in the view expressed by my 800] noble and learned friend Lord Hatherley, and as *there is no difference of opinion among your Lordships, I shall express my views in regard to the case very briefly.

Your Lordships have not heard the appellants on the question raised by the *first* plea in law for the respondents,

viz.: Whether the barony titles possessed by the respondents are sufficient of themselves, and without any proof of possession, to entitle the respondents to the decree sought by the present action, and therefore I express no opinion whatever in regard to that plea.

The court below has dealt with the case under the *second* plea in law urged by the respondent (¹); and the question for decision is well expressed by Lord Mure in these words, viz.: "Whether the pursuer's title, taken in connection with the proof of possession which has been had of the foreshore, is sufficient to entitle him to decree in terms of the conclusions of the summons?"

I have very carefully considered the respondents' titles, and the evidence of possession of the foreshores in question which has been adduced both on behalf of the respondents and on behalf of the Clyde trustees, and I am of opinion that the respondents have clearly established the case made by them under their second plea in law. It is not necessary to go into any detail of the titles or of the evidence. Both of these matters have been elaborately dealt with by the Lord Ordinary (Lord Curriehill) and by Lord Mure in the court below, and also by my noble and learned friend Lord Blackburn, and I concur generally in the views which have been expressed in regard to them. As to the evidence led by the Clyde trustees, I am of opinion that the acts proved to have been done by them were all done in exercise of the rights conferred on them by statute, and that these acts do not affect the possession proved to have been had by the respondents.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 19th June, 1879.

Agents for appellants: *Walter Murton* (Board of Trade) and *W. A. Loch*.

Agents for respondents: *Grahames, Wardlaw & Currey*.

(¹) *Ante*, p. 547.

See 24 Eng. R., 459 note; 18 Cent. L. J., 1; 8 McCrary, 265 note.

Canada, Upper: *McLaren v. Caldwell*, 6 U. C. App., 456.

Illinois: *Joliet v. Helay*, 94 Ills., 416; *Washington, etc., v. Shortall*, 101 Ills., 46.

Ireland: *Hamilton v. Atty. Gen.*, L. R., 5 Ir., 555.

Michigan: *Nelson v. Sheboygan*,

etc., 44 Mich., 7; *White River, etc., v. Nelson*, 45 Mich., 578.

Minnesota: *St. Paul v. First, etc.*, 26 Minn., 31; *Morrill v. St. Anthony*, Id., 222; *State v. Minneapolis, etc.*, Id., 229.

Missouri: *Meyer v. St. Louis, etc.*, 8 Mo. App., 266.

New York: *Chenango, etc., v. Paige*, 83 N. Y., 178; *Trustees v. Kirk*,

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Phosphate Sewage Company v. Molleson.

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84 id., 215; Knickerbocker, etc., v. Forty-second, etc., 65 How. Pr., 210; Jordan v. Metropolitan, etc., Id., 255; O'Donnell v. Kelsey, 2 Edm. Sel. Cas., 861, 10 N. Y., 412.

Oregon: Moore v. Willaneeth, 7 Oregon, 355; Parker v. Taylor, Id., 485.

Pennsylvania: Simpson v. Neill, 89 Penn. St. R., 183; Hartley v. Crawford, 81 Penn. St. R. (Sup.), 478.

Rhode Island: Providence, etc., v. Steamship Co., 12 R. I., 348; Aborn v. Smith, Id., 370; New England, etc., v. McGurrey, Id., 885.

United States, Circuit and District: Rutz v. St. Louis, 3 McCray, 265, 265 note.

Wisconsin: Black River v. La-crosse, 54 Wisc., 660.

[4 Appeal Cases, 801.]

H.L. (Sc.), July 8, 1879.

[HOUSE OF LORDS.]

801] *PHOSPHATE SEWAGE COMPANY, Limited, and THE OFFICIAL LIQUIDATOR THEREOF, *Appellants*; MOLLESON, *Respondent* (¹).

Res judicata—Competent, and omitted—Scotch Sequestration—19 & 20 Vict. Bankruptcy (Scotland) Act, c. 79, s. 127.

For the purpose of having a contract of sale of a concession set aside on the ground of fraud, and repayment of the purchase-money, £65,000, with interest, a company filed a bill of complaint in the English Court of Chancery.

At the same time they lodged a claim to be ranked, for the same sum, upon the estates of a firm carrying on business in Edinburgh and London, which had been sequestrated in Scotland. In the claim, the company described the debt as owing under the circumstances set out at length in the bill in chancery "produced and held as repeated *brevitatis causâ*." To the chancery suit the trustee of the sequestrated estates was a party. The trustee having rejected the claim, the Lord Ordinary ordered a condescendence and proof. The proof was adduced on the 16th of June, 1874. The Court of Session, and ultimately, this House, held that the claimants were not entitled to the debt claimed against the sequestrated estates; and refused to sist the proceedings in the sequestration, pending the issue of the chancery suit (1 App. Cas., 780).

The bill in chancery as filed alleged certain *indicia* of fraud; afterwards additional evidence of fraud was discovered, in time to have it inserted by way of amendment. The bill was finally amended on the 3d of March, 1874. Subsequently a decree was made by the Vice-Chancellor, and affirmed by the Court of Appeal, rescinding the contract, and ordering repayment of the £65,000; and a declaration was added, that the plaintiff company should be at liberty to prove in the sequestration suit in Scotland for the £65,000 (5 Ch. D., 394).

Founding on this decree the company lodged another claim with the trustee in Scotland. Again the trustee rejected the claim; and again a condescendence was made up. The company this time put their claim upon the allegations contained in the bill in chancery as finally amended on the 3d of March, 1874. The trustee relied on the plea of *res judicata*:

Held (affirming the decision of the court below), that the plea of *res judicata* prevailed, because (1) the new allegations of fraud in the amended bill in chancery did not constitute a new *medium concludendi*; (2) the alleged facts were within the knowledge of the claimants before the proof was adduced in the former action, and might have been inserted by amendment in their closed record in Scotland.

(¹) Affirming Court Sess. Cases, 4th Series, vol. 5, p. 1125; 15 Scot. L. Repr., 666.

Held, also, that no question arose as to the validity, or examinability, of a foreign judgment.

Per EARL CAIRNS, L.C.: A party who has been unsuccessful cannot be allowed to *reopen the litigation merely by saying, since the former litigation there is [802 another fact, going exactly in the same direction with the fact stated before, and leading up to the same relief asked for before, but it being in addition to those facts, it ought now to be allowed to be the foundation of a new litigation, and he should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say—I will show you that this is a fact which entirely changes the aspect of the case, and further I will show you that it was not and could not by reasonable diligence be obtained by me before.

APPEAL from the First Division of the Court of Session.

This was the third claim made by the appellants, the Phosphate Company with its liquidator, to be ranked upon the sequestrated estates of Messrs. Peter Lawson and the individual partners of that firm, for the principal sum of £65,000, with interest, on the ground that they were parties to a fraudulent transaction by which the Phosphate Company were deceived into purchasing for that sum a worthless concession of guano, guanito, and phosphate of lime, on the island of Alto Vela, belonging to the Republic of San Domingo.

The firm of Lawson & Son carried on business in Edinburgh, and also in London. They were adjudicated bankrupts in Scotland on the 11th of February, 1873, and the respondent J. A. Molleson was chosen trustee of the sequestrated estates.

In support of the present claim the appellants produced and founded on a decree obtained in the High Court of Justice, Chancery Division, dated the 22d of March, 1876, in a suit in which the appellants were plaintiffs, and the respondent and certain other persons were defendants. By this decree it was, *inter alia*, ordered that the appellants should be at liberty to prove under the sequestrated estates of Peter Lawson & Son as a company, and Charles Lawson, Charles Lawson, junior, Henry Graham Lawson, and George Stodart Lawson, the only partners of the said company, as such, and as individuals, for the said sum of £65,000, and interest at the rate of 4 per cent. They also founded on an order in the Court of Appeal, dated the 13th of April, 1877, dismissing an appeal taken by the respondent and others against the said decree with costs (*).

The appellants now insisted that effect should be given to the *chancery judgments in the sequestration, and [803 that they should be ranked for a dividend in respect of the claim.

(*) 5 Ch. D., 394, where the facts of the case are set out *in extenso*.

The respondent met this contention by the plea of *res judicata*, founded on a judgment of this House, dated the 22d of June, 1876, affirming an interlocutor of the Court of Session, affirming the deliverance of the respondent dated the 27th of October, 1873, rejecting a previous claim by the appellants to be ranked in the sequestration for the same identical sum of £65,000, with interest at the rate of 5 per cent. (*).

The history of the former procedure in the Court of Session, Scotland, need only be given shortly.

On the 14th of March, 1873, the appellants lodged their first claim on the bankrupts' estates for £65,000 and £5,529 5s. in respect of interest at 5 per cent. This claim they withdrew on the 24th of June following, a few days before the adjudication of the trustee.

On the 28th of June they lodged their second claim for the same sum, and on identical grounds, viz., that the said sum was owing to them under the circumstances set out at length in a bill of complaint in chancery filed the 19th of April, 1873, between the appellants' company and the respondent Molleson and certain other defendants, and "as concluded for under the first item of the prayer of the said bill of complaint, a printed copy of which bill is signed by the deponents, and here produced and held as repeated *brevitatis causâ*."

On the 27th of October, 1873, the respondent pronounced a deliverance by which he rejected the claim. The appellants appealed (*) to the Lord Ordinary officiating on the bills, and a record was ordered to be made up.

On the 6th of January, 1874, the record ordered was closed, reference being made therein to the before-mentioned bill in chancery as re-amended, holding the statements repeated *brevitatis causâ*.

The appellants insisted that the proceedings in the Scotch sequestration should be stayed until judgment was obtained [804] in a *suit involving the same question, and between the same parties, in the English Court of Chancery; secondly, that the trustee should be ordered to set aside a dividend to meet the appellants' claim; and thirdly, that the deliverance of the trustee should be recalled.

On the 13th of February, 1874, the Lord Ordinary (Shand) repelled the first and second pleas; but allowed the parties a proof of their respective averments.

On a reclaiming note by the appellants, the First Divi-

(*) 1 App. Cas., 780; 18 Eng. R., 63; p. 840; and vol. iii (H.L.), p. 77.
Court Session Cas., 4th Series, vol. i, (*) 19 & 20 Vict. c. 79, a. 127.

sion, 18th of March, 1874, adhering to the Lord Ordinary's interlocutor, refused to interrupt the sequestration, holding that the Scotch procedure gave every opportunity to prove the debt.

On the 16th of June, 1874, the proof, allowed on the 13th of February, was adduced; and the Lord Ordinary (Young) reported the whole case to the Court of Session (*).

It appeared from the proof that 1,500 fully paid-up shares of the company, equivalent at the time to £15,000, were handed to Messrs. Engelbach & Keir, the purchasers in trust for the Phosphate Company. But this fact was not set out in the condescendence.

The First Division subsequently heard counsel on the whole case, and remitted it back to the Lord Ordinary to refuse the appeal and to confirm the deliverance of the trustee, holding that the appellants were not entitled to be ranked upon the estates.

On the 22d of July, 1874, the Lord Ordinary pronounced an interlocutor in terms of the remit, and the case was finally disposed of in the Court of Session on the 1st of December following.

The appellants appealed to this House against the interlocutor refusing to sist the proceedings in the sequestration, and against the subsequent interlocutors on the merits.

On the 22d of June, 1876, this House (present Lord Cairns, L.C., Lord Chelmsford, and Lord Selborne) affirmed the decision of the court below, holding that they were right in not sisting the proceedings; and that the appellants had failed to instruct fraud on the part of Messrs. Lawson & Son to entitle them to be ranked for the amount of the purchase-money (*).

During these years the litigation on the bill originally filed on the 19th of April, 1873, was proceeding in the Court of Chancery in England. That bill sought to have [805 the respondent, as trustee of Messrs. Lawson's estate, and certain other defendants held jointly and severally liable to make good the sum of £65,000 and interest thereon, because that under the circumstances set out in the bill the sale of the concession to the appellants' company was fraudulent and ought to be rescinded, and the money returned to the appellants.

On the 18th of July, 1873, the respondent filed his answer, and the other defendants filed their answers on subsequent

(*) Court Sess. Cas., 4th Series, vol. iii Court Session Cas., 4th Series, vol. iii (H.L.), at p. 78. (H.L.), p. 77.

(*) 1 App. Cas., 780; 18 Eng. R., 68;

dates; in particular, John Ogle filed his on the 22d of November, 1873.

Several new matters having come to light, the appellants found it necessary to amend their bill from time to time, and they finally did so on the 3d of March, 1874. The material amendment, so far as affects this claim, was an allegation that out of the £65,000, Lawson & Son and certain others agreed that £15,000 should be paid to Engelbach and Keir, who were the company's agents. And the following was added to the first item of the prayer of the bill: "Or if this court shall not think fit to set aside the said purchase altogether, the said above-named defendants may be decreed to replace the sum of £15,000 improperly paid in shares to the defendants Engelbach and Keir in excess of the purchase-moneys payable to the vendors." The plea of the respondent that he held the sequestrated estates subject only to the orders of the Court of Session was rejected, and he continued a defendant in the suit.

On the 22d of March, 1876, after a hearing extending over sixteen days, Vice-Chancellor Malins held that the sale of the concession was fraudulent, and it was ordered to be set aside, and that the money should be returned; and, as above mentioned, a declaration was added that the plaintiffs, the appellants, should be at liberty to prove in the sequestrated suit in Scotland against the estates of the Lawsons for the sum in question.

On the 13th of April, 1877, this decree was affirmed by the Court of Appeal⁽¹⁾. Thereupon the appellants lodged the present claim. The trustee rejected it, contending that it was the same identical claim as formerly rejected by him, the only difference being the amount of interest; and that in the former procedure in Scotland the appellants had full 806] opportunity to substantiate *the allegations contained in the finally amended bill in chancery. Again a condescendence was ordered, and a pleading on both sides took place. The appellants again put their claim upon the allegations contained in the bill filed in the Court of Chancery; but this time they added that they claimed upon the allegations of that bill as thirdly and finally amended on the 3d of March, 1874.

The only material matters which are alleged not to have been stated, or pleaded upon by the appellants, in their condescendence and pleas, in the former appeal to this

(1) 5 Ch. D., 394; 22 Eng. R., 157.

House, are set out in the 6th article of their condescendence in this appeal, which was as follows:

The said judgments of the Court of Session and of the House of Lords were pronounced upon the questions between the parties, as presented on the record in the said appeal, which differed from the case made by the thirdly re-amended bill and the evidence led before the Court of Chancery. The House of Lords pronounced no opinion on the case raised by the thirdly re-amended bill, and the other pleadings and evidence before the Court of Chancery. Their Lordships' judgments are referred to from which it appears that the question raised by the present claim is not *res judicata*. There were several matters which were pleaded in the thirdly re-amended bill, and which emerged in the course of the chancery suit already referred to, and on which the decisions in that suit proceeded, which were not stated or pleaded upon by the appellants in their condescendence and pleas in the said former appeal, and which were not known to them at the time of the closing of the record in the said appeal. The statements made in answer are denied, and it is explained that until the several answers of Engelbach, and Keir and Ramsden, filed respectively on the 12th of January, 23d of April, and the 27th of April, 1874, were put in in the chancery suit, the appellants had little or no knowledge of the history of the formation of the company, and most of the fraudulent transactions relating thereto, as for instance the alteration of its shares for Stock Exchange purposes,—the agreement to pay £15,000 as a bribe to Engelbach and Keir, in order to induce them to accept the title,—the circumstances under which the requisitions were waived, and the title accepted, and the several deeds and agreements prepared and executed by which the concession was foisted on the company; and further, it was not until the discovery of documents obtained in the suit, and the oral examination of parties and witnesses at the hearing (during November and December, 1875), in particular of Ogle, Forsyth, and Henry Graham Lawson, that evidence was obtained to connect the firm of Peter Lawson & Son, and the individual members thereof, with the fraudulent scheme charged against them by the thirdly re-amended bill, and with the additional acts of fraud and misrepresentation in connection with the concession and the company hereinafter condescended upon.

The answer of the respondent was as follows:

Admitted that the said judgment was pronounced on a

closed record, which is referred to for its terms. *Quoad ultra* denied. Explained that the only matter pleaded 807] *upon in the chancery suit (as appearing from the finally amended bill filed by the appellants therein), and not specially pleaded upon in the closed record in the former appeal, was the alleged payment of a sum of £15,000 by the promoters of the company to Messrs. Engelbach and Keir, which payment, and the particulars connected therewith, were known to the appellants long prior to the closing of the record in said former appeal, and prior to the lodging of the original condescendence in said appeal, having been set forth in the answer filed for John Ogle in said chancery suit on the 22d of November, 1873. Explained further, that the said alleged payment was the subject of proof and discussion in the said former appeal, the whole proceedings in which are referred to, and held as repeated *brevitatis causâs*.

The appellants maintained that the decree of Vice-Chancellor Malins was entitled to receive effect, because it proceeded (1) upon the consideration of matters which were *noviter veniens in notitiam*, and were not founded on in the former case in the Court of Session; and (2) because the present claim was founded on a new *medium concludendi*, which was not founded on, nor adjudicated upon in the former claim.

The pleas in law for the appellants were:

(1.) In respect of the decree of the Chancery Division of the High Court of Justice, mentioned in the affidavit, the appellants are entitled to be ranked on the sequestrated estates of Peter Lawson & Son, and of the individual members of the firm, in terms of the claim. (2.) The said decree having been pronounced against the respondent by a court of competent jurisdiction, and in a suit in which he appeared, and throughout defended, falls to be given effect to. (4.) The judgments of the Court of Session and the House of Lords affirming the respondent's former deliverance do not decide the question raised by the present appeal, and it is therefore not *res judicata*. (6.) The bankrupts, Peter Lawson & Son, and the individual members thereof, having, as set forth on record, fraudulently conspired with the other parties there mentioned to induce the appellants, by means of fraud, to pay £65,000 for a valueless subject, they are, along with the other said parties, jointly and severally liable to the appellants in reparation to the amount claimed.

The pleas in law for the respondent were:

(1.) *Res judicata*. The present claim is based on the same medium as the claim adjudicated on under the former appeal. (2.) The whole material averments of the appellants having been made in the former appeal, or having been competent to be made therein and omitted, the appellants are not entitled to a re-trial of the case. (3.) The decree of the High Court of Justice founded on is ineffectual to determine the validity of the appellants' claim in the sequestration, &c.

On the 10th of April, 1878, the Lord Ordinary (Lord Adam) sustained the respondent's plea of *res judicata*; and affirmed his *deliverance, rejecting the claim of the [808 appellants. This interlocutor was adhered to by the First Division of the Court of Session on the 5th of July, 1878 (*).

On appeal to this House,

Mr. Davey, Q.C., and Mr. Alexander Young, appeared for the appellants.

Mr. Cohen, Q.C., and Mr. Mackintosh, were heard for the respondent.

The following cases were commented on: *Hunter v. Stewart*—defence of *res judicata* cannot be sustained where grounds of relief alleged by the bills are different (*); *Kinlocks v. Oliphant* (*); *Paton v. Sterling*—competent and omitted (*); *Moss v. Anglo-Egyptian Navigation Company*—*res judicata* (*); *Macdonald v. Macdonald* (*); *Barrs v. Jackson*—opinion of Knight Bruce, V.C., and civil law cited (*); *Duchess of Kingston's Case*, and *Doe v. Oliver*, and notes thereon (*); *Godard v. Gray*—examinability of foreign judgment (*); *Howlett v. Tarte*—estoppel (*); *New Sombrero Phosphate Company v. Erlanger*—fraud—rescission of contract (*); *Bagnall v. Carlten* (*); *Lindsay Petroleum Company v. Hurd* (*); *Stewart v. Stewart* (*); *Southgate v. Montgomerie*—foreign decree (*); *Roy v. Kirkland* (*); *Goetze v. Aders, Preyer & Co.* (*); Erskine 4, 3, 4; Stair 4, 1, 44, and 4, 40, 16; s. 127 of 19 & 20 Vict. c. 79;

(*) Court Sess. Cas., 4th Series, vol. v, p. 1125; Scottish Law Rep., vol. xv, p. 666.

(*) 4 D. F. & J., 168, and at pp. 176, 179; 81 L. J. (Ch.), 346.

(*) Morr. Dic., 12,233.

(*) Ibid, 12,229.

(*) Law Rep., 1 Ch. App., 108.

(*) Court Sess. Cas., 2d Series, vol. ii, p. 889; affirmed, 1 Bell's App., 819.

(*) 1 Y. & C. Ch., 585, at pp. 587, 589; on appeal reversed, 1 Phil., 582.

(*) Ibid, 4th Series, vol. ii, p. 150.

(*) 2 Sm. L. C., 8th ed., at pp. 784, 801, 830, 837, 839.

(*) Law Rep., 6 Q. B., 139; 40 L. J. (Q.B.), 62.

(*) 10 C. B. (N.S.), 813.

(*) 5 Ch. D., 73; 21 Eng. R., 798.

(*) 6 Ch. D., 371; 23 Eng. R., 1.

(*) Law Rep., 5 P. C., 221.

(*) Court Sess. Cas., 1st Series, vol. xvi, p. 632.

(*) Ibid, 1st Series, vol. xv, p. 507.

(*) Ibid, 2d Series, vol. xvi, p. 51.

see also *Gillespie v. Russel* (¹); *Strathmore v. Strathmore's Trustees* (²); *Wilkie v. Cathcart*—question of jurisdiction (³).

809] *The Law Peers delivered the following opinions:

EARL CAIRNS, L.C.: My Lords, this case has been argued with great force and ability by the learned counsel for the appellants and the respondent; but in the view which I take of the case it will not be necessary that I should go at any great length into many of the questions which have been brought before your Lordships. With regard to the point which really has to be determined the narrative of the facts seems to me to lie in a very small compass.

My Lords, in the year 1873, there being a sequestration of the firm of Lawson & Sons, in Edinburgh, a claim was made by a person who represented the Phosphate Sewage Company, the present appellants, to prove for a particular debt. The character of that debt he described in the document which made the claim. He described it in this way:—he said there was due and owing a very large sum (£70,000 and upwards) by the bankrupts to the Phosphate Sewage Company, “under the circumstances set forth at length in the bill of complaint in chancery” (that is, in the chancery of England), “filed on the 19th of April, 1873, between” certain persons there mentioned, “and as concluded for under the first item of the prayer of the said bill of complaint, a printed copy of which bill is signed by the deponent,” “and is herewith produced and held as repeated *brevitatis causâ*,” that is to say, his case was, I have filed a bill in the Court of Chancery in England, and I have described in that bill the circumstances under which I claim this debt against the estate under sequestration, and I hand in the bill as a narrative of the facts on which my claim is founded. The trustee under the sequestration refused to admit the claim, an appeal was made from the trustee’s decision to the Court of Session in the ordinary way, a pleading was ordered to take place, and there was a condescendence and an answer. The condescendence again referred in terms to the bill of complaint, which was then pending in the Court of Chancery in England, and repeated the allegations contained in that bill of complaint, that bill of complaint having been filed, as I have stated, on the 19th of April, 1873. The case upon that condescendence and upon those facts, came before the 810] Lord Ordinary and the Court of Session in *Scotland, and ultimately came before your Lordships’ House. The

(¹) Court Sess. Cas., 3d Series, vol. xix, p. 897; on appeal, 3 Macq., 757.

(²) Ibid, 1st Series, vol. xi, p. 644.

(³) Court Sess. Cas., 3d Series, vol. ix, p. 168.

result of the decision was that the Phosphate Sewage Company, represented by their liquidator, were held not to have proved and not to be entitled to, the debt which they claimed against the estate under sequestration. That is *res judicata* upon those facts, and upon those materials to which I have referred, and there is no question that it cannot now in any way be set aside; that decision stands as perfect and complete law.

Then the bill of complaint which was pending, as I have stated, in the Court of Chancery in England, went on in the ordinary course of chancery litigation in this country. The bill was amended in a manner which I shall afterwards mention, and it came on for hearing in the Court of Chancery, and a decree was made by the primary judge, and affirmed by the Court of Appeal, declaring that the Phosphate Company were entitled against certain parties to that litigation to relief, and to be paid a large sum of money. One of these was the trustee of this sequestrated estate. Of course, against him there could be no order that he should pay any money, for he was not personally liable; and against the sequestrated estate there could be no order, because it was not within the jurisdiction or under the administration of the Court of Chancery in England. But a declaration was made (I will not stop to consider whether it was entirely in accordance with international comity or not) that the plaintiffs in that suit, the Phosphate Company, should be entitled to go in and prove in the sequestration suit in Scotland against the estate of the Lawsons for the sum in question. That having been done, the Phosphate Company again applied in Scotland to the sequestrator.

I have mentioned this suit in the Court of Chancery in England, but it really appears to me that the case need not be embarrassed with any question as to a foreign judgment, or the validity or the examinability of a foreign judgment. When I find an application again made to the sequestrator in Scotland, it seems to me that it is just as if the application had been made *de novo* in the sequestration in Scotland, without there having been in the meantime any judgment in a court in England at all, and that the application in Scotland must be judged of just as if a fresh proceeding or a fresh suit had been instituted in Scotland.

*Now, what was the fresh proceeding, and what was [811] the fresh application in Scotland? The Phosphate Company again applied to the sequestrator, and again applied upon a document which was the foundation of the claim, and this time the Phosphate Company in its document of

claim said, We apply by virtue of a decree, and for payment of the sum mentioned in a decree, of the Court of Chancery in England. The sequestrator refused the claim; and, as before, the question came before the Lord Ordinary and the Court of Session, and, as before, a condescendence was ordered, and a pleading upon both sides. At the outset, when the condescendence is looked at, you find that the Phosphate Company again put their claim upon the allegations contained in the bill filed in the Court of Chancery in England; but this time, in place of saying that they claim upon the allegations of the bill filed in the Court of Chancery in England on the 19th of April, 1873, they say they claim on the allegations of that bill as thirdly amended on the 3d of March, 1874.

Of course, if they had claimed on the allegations contained in the bill filed on the 19th of April, 1873, there would have been nothing to argue; the case would have been absurd, and at once out of court. The only color upon which the second action in Scotland can be supported is whatever difference there may be found to be between the allegations in the bill filed originally on the 19th of April, 1873, and the bill as amended on the 3d of March, 1874. If there is no difference, then the case is just as hopeless as if it had been launched upon a repetition of the allegations in the original bill. If there is a difference we must ascertain what that difference is, and whether it will afford a ground for a new action without the bar of *res judicata* being pleadable; and secondly, whether this new and different matter was matter which was in the knowledge of the Phosphate Sewage Company at the time when the first suit was disposed of.

Now, my Lords, what is the difference? The difference appears in certain red ink alterations which represent the ultimate amendments of the bill in chancery. I need not go through them in detail, because it is admitted that among those red ink alterations there is only one that has any bearing at all upon the case, or assumes the appearance of a new ingredient in the case, and that *is an allegation that of the purchase-money mentioned in the bill as it originally stood, and the repetition of which was sought, namely, £85,000, while £50,000 was to be paid to Hartmont, Lawson, Son & Ogle in certain shares, they agreed between themselves that £15,000 should be paid to the defendants Englebach and Keir. It is said now that that was a circumstance which gave a still more fraudulent character to the transaction than it originally possessed, and that that is a material

difference between the original statements and the statements by amendment.

I must, however, stop here for the purpose of observing that when I turn to the prayer of the bill after this amendment, I find that in the prayer of the bill, ranging over ten paragraphs, there is no alteration whatever in the amended bill except in the first paragraph, and it was upon the conclusions of the first paragraph that the claim in the original suit in Scotland was founded. Now, my Lords, what is the alteration which is made in the first paragraph of the prayer? There is no alteration whatever as regards the claim that the estate of Lawson & Sons, and the other persons mentioned should be held liable to repay the £65,000 and interest. The only alteration is this; there is added an alternative prayer, which for the present purpose may be entirely put out of the case, but which seems to exhibit what was considered by the pleader to be the materiality of this question as to the £15,000. The alternative prayer is this: "Or if this court shall not think fit to set aside the said purchase altogether, the said above named defendants may be decreed to replace the sum of £15,000 improperly paid in shares to the defendants Englebach and Keir in excess of the purchase-moneys payable to the vendors."

The idea, therefore, does not at this time seem to have been that the question of the payment to Englebach and Keir of £15,000, introduced by way of amendment, gave any new aspect or any new strength to the main case alleged by the bill, the case for the repetition of the whole purchase-money, but that it gave rise to a separate and independent and alternative relief which might become available if the other relief primarily sought were not given, namely, the relief to have back the £15,000 upon the ground I have mentioned. That is entirely out of the case, *because [813 that relief was not ultimately given. The result therefore is this, that as I read the bill, although it is true there is this difference between the original bill and the amended bill, that whereas in the original bill nothing was said specifically or particularly about this £15,000, it is mentioned particularly in the amended bill, and is mentioned, I will concede, in a way that may add an additional particle of proof of fraud, yet it is mentioned as a separate ground for relief which has become immaterial.

Before I consider whether the addition of an additional ingredient as to fraud would become material, the question arises, when did the plaintiffs know of this payment of the £15,000? Now, my Lords, here the dates are material. The

bill was amended, as I have said, and assumed its final shape on the 3d of March, 1874. The statement in the present condescendence on that subject is this, "There were several matters which were pleaded in the thirdly re-amended bill, and which emerged in the course of the chancery suit already referred to, and on which the decisions in that suit proceeded, which were not stated or pleaded upon by the appellants in their condescendence and pleas in their said former appeal, and which were not known to them at the time of the closing of the record in the said appeal. The statements made in answer are denied, and it is explained that until the several answers of Englebach and Keir and Ramsden, filed respectively on the 12th of January, 23d of April, and 27th of April, 1874, were put in in the chancery suit, the appellants had little or no knowledge of the history of the formation of the company, and most of the fraudulent transactions relating thereto, as for instance, the alteration of its shares for Stock Exchange purposes, the agreement to pay £15,000 as a bribe to Englebach and Keir in order to induce them to accept the title, the circumstances under which the requisitions were waived, and the title accepted, and the several deeds and agreements prepared and executed by which the concession was foisted on the company." Then they go on to say that they had not a discovery of the documents until afterwards.

Now, my Lords, taking that as it is stated, it would appear that certainly at the latest, on the 27th of April, 8[14] 1874, they had knowledge *of it. It must of course have been known to them before that: it must have been known to them on the 3d of March, when the bill was amended; indeed, on the 12th of January they must have had some knowledge by the answer. But we have now this clearly, that in the answer of the defendant Ogle, which was put in on the 22d of November, 1873, there was a statement that this £15,000 had been paid.

My Lords, your Lordships are informed by the learned judges of the Court of Session that although the record was closed in the original proceeding in Scotland before the 3d of March, 1874, the proof was not led in it until the 16th of June, 1874, and that it would have been competent, and almost a matter of course, for the Phosphate Company at any time before the proof was led, on ascertaining this additional fact or these additional facts, if they considered them material, to have applied to open the record and close it again, and led their proof upon the whole of the facts which had thus come to their knowledge.

Now, my Lords, these being the facts of the case, my first observation is this. As I understand the law with regard to *res judicata*, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to reopen that litigation by merely saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been, ascertained by me before. Now I do not stop to consider whether the fact here, if it had come under the description which is represented by the words *res noviter veniens in notitiam*, would have been sufficient to have changed the whole aspect of the case. I very much doubt it. It appears to me to be nothing more than an additional ingredient *which [815 alone would not have been sufficient to give a right to relief which otherwise the parties were not entitled to. But it is unnecessary to dwell upon that, because it is perfectly clear upon the statement of the present appellants themselves that this fact was within their knowledge before their proof was led in the former action, and they were just as free to have had the record opened and to have had it stated, as if it had come to their knowledge before the record was closed.

My Lords, that being so, it appears to me that it would be contrary to the whole principle upon which litigation under the rule of *res judicata* is made to be final, to allow this litigation to be reopened upon the ground which is alleged. It appears to me that looking at this, as we must look at it, as a fresh litigation commenced in Scotland, those who are commencing it have nothing upon which they can base it, except an allegation that there was not in the former litigation a mention made of the payment of this £15,000 and of the shares into which it was turned, and that those facts not having been mentioned upon the former occasion, the Phosphate Company should therefore be allowed to have a new litigation in order to introduce those facts. They are met at once by the circumstance that the facts were within their knowledge, and that they might have taken proceed-

ings to have brought them before the court on the former occasion.

It appears to me, my Lords, that the unanimous decision of the learned judges of the court below, the Lord Ordinary, and the Lords of Session, is one which is entirely satisfactory ('). I do not go into any greater detail, because the case has been so fully and so satisfactorily disposed of by them. I shall simply submit to your Lordships that this appeal should be dismissed with costs.

LORD HATHERLEY: My Lords, I entirely concur in the opinion which has been delivered by my noble and learned friend on the woolsack.

I confess that during a portion of the argument I was very much struck by the length to which it was supposed that the doctrine could be pushed of amending a case by 816] introducing *matter which was in the knowledge of the parties making the claim, provided only that that new matter would give them a new and additional cause for advancing their suit, and a new and additional right to have that suit decided in their favor. I asked during the argument for authority—for a reference to any case in which persons had been allowed to do that when they had had full knowledge of the various ingredients making up a case of fraud, which materials in many cases are extremely abundant, but had exercised the right of keeping back a portion of those materials within their knowledge which might possibly have led to some variation in the relief granted, and which were but part of the one great scheme of fraud, and were treated by them in the last instance as part of the one great scheme of fraud, by which they were deceived, and in respect of which, as in the present case, in the Court of Chancery in England they obtained relief.

The course which this cause took in the Court of Chancery was this: The record alleged certain *indicia* of fraud which seem to have been sufficient in the minds of the judges of that court, and not to have been at all set aside. The *indicia* alleged seemed to them sufficient to establish the case as alleged in the first claim in that suit. Afterwards it was found that there was an additional and a considerable evidence of fraud, namely, the bribing of an agent who had been employed in carrying the transaction into effect. That seems to have been discovered after the filing of the original bill in the suit below, but in time to have it inserted by way of amendment in the bill which was amended about a year afterwards, and in time to have it inserted also, if the parties

(1) Court Sess. Cas., 4th Series, vol. v, p. 1125.

had chosen so to do, in the record in the litigation which they were carrying on in Scotland in reference to establishing a claim against the estate of Lawson & Sons. They failed upon the previous occasion, as has been described by my noble and learned friend on the woolsack, in the courts of Scotland, and ultimately in this House.

The additional matter seems to have come to the knowledge of the parties, who are the appellants in the present case, between the period of their filing their original bill in chancery and the period of their amending it on the 3d of March, 1874. Probably, the first intimation which they received of it was derived from the *answer of Ogle, to [817 which reference has been made. What was done upon that occasion? No doubt it was an instance of gross fraud. That must be the character of an attempt to bribe the agent of any person with whom you are dealing with respect to a purchase, or a sale, for it would be the same in either case, in order to bring you, the purchaser or the vendor as the case may be, into a position in which by false representations, or by silence where there ought to have been disclosure on the part of your agent, you are led, believing your agent to be honest, into either the sale or the purchase in question, which you desire to get rid of. If it had been a case of a sale of your own property, the agent could not so well be bribed out of the fund which was to be produced as the result of the fraud; but in the case of a purchase, of course, there are ways and means, some of which were adopted in this case according to the statements before us, of bribing the agent by giving him a share of the purchase-money which is to be obtained by means of his agency and his fraud. When that takes place there are two or three ways in which the fraud may be perpetrated, and two or three methods also in which the person defrauded may secure a right to be recouped in respect of the injury he has thereby sustained. Either he may do as has been done in the case of this bill in which this fraud of paying the briber was brought forward, either he may say, If you do not give me the larger relief which I think I am entitled to (and which he ultimately obtained in chancery), at least set me right with my agent and take care that I have the £15,000 which he has received, or obtained a right to receive, as between himself and his co-conspirators, whatever may become of the larger claim I make. But ultimately the larger claim was sustained, and therefore the £15,000 was at once put out of the question. Or a second point upon which he may rely is this: This was a portion of the fraud I alleged in my original bill; my

original bill stated a case of fraud upon which I said I was entitled to relief, but I can now fortify it by showing that he ought to have protected me, namely, my own agent, has been himself a party to the fraud and has been a co-conspirator with the rest in endeavoring to defraud me of my money. That is only an additional proof of the fraud alleged.

818] *Therefore, my Lords, I come round again to this question, Is it or is not the law (I do not know any authority going to that extent) that if a man has been the victim of a fraud of this description in the purchase of a mine or the like—if a man has been led and induced to become the purchaser of property by a variety of fraudulent misrepresentations—he may bring forward his case and enter upon a litigation for the purpose of putting himself in the position in which he was before the fraud was committed; and that he is to be allowed to select a certain number of instances of that conduct which led up to the successful result of the fraud, to select as many of those instances as he may think proper, and to put them in the forefront of his proceedings to set aside the transaction; and afterwards, having a certain number of other circumstances within his knowledge, he is to be allowed to bring forward those circumstances and say, This is a new *medium concludendi* with regard to the case I am now bringing forward; this will be an independent case, which I shall be entitled to assert. If so, we might go through all the various circumstances and acts of fraud which led to the result; we might go through them one by one and year by year, so far as I can see, according to that line of argument. From time to time, as the matter passes through all the stages of litigation, the plaintiff might say, I have now brought forward another fact; this is the fact which you have not yet decided upon; this is not *res judicata*, because it is a portion of evidence which I have not presented to your minds before; I have failed to prove, or I have failed to satisfy you of the sufficiency of the proof with respect to the several facts I alleged in my original attempt to obtain justice, and now I proceed to bring forward other facts of a still stronger character, which I think will persuade the court I am addressing to give me the relief which upon the first showing of the case they were not satisfied to give me upon the evidence I was then able to produce. My Lords, I should be very much surprised if that was held to be the doctrine of any court, or if in any civilized country litigation could be protracted in the endless manner that it would be if that were the state of the law.

However, my Lords, in this case what has happened? The information was acquired, as has been described, at a time when *the appellant might have introduced it. [819] He did introduce a statement of it into the bill in chancery by an amendment, and he might have introduced it into this claim in the Scotch court by amendment also, as we are told by the Scotch judges, at the time he became acquainted with it, although it was after the record was closed, upon making a due and proper application to have an opportunity of so stating his case. He brings it in as a simple *indictum* of fraud without insisting upon any other relief, because he obtained from the Court of Chancery that which he considered much better than the alternative relief which he glanced at, but did not further pursue, when he first introduced the mention of the bribe of £15,000.

He having done that, it appears to me to be quite clear that it falls within the operation of the plea put in on the other side in this action; and, therefore, all that we can do is to follow the view which has been most clearly and admirably expressed in the several judgments in the court below⁽¹⁾. I think that those learned judges have come to the right conclusion, and that their interlocutor, which is complained of, should be affirmed, and that this appeal ought to be dismissed with costs.

LORD BLACKBURN: My Lords, I am so entirely of the same opinion as my two noble and learned friends who have already spoken, that I should scarcely have thought it necessary to add anything, if it was not that I wish to point out that there are a great many of the topics which were discussed in the court below, and have been here also discussed at the bar, which do not seem to me to come into question, and upon which it is not necessary to pronounce any opinion at all. [Having stated briefly the point upon which the case turned, as above, p. 803.]

My Lords, I think the law of Scotland is clear enough, that upon the ordinary action, where you seek to recover anything, *res judicata* is an answer subject to two observations. The one is that where there is *res noviter veniens in notitiam*, which is nearly equivalent to saying that you were taken by surprise and have since discovered material evidence, you have a ground; if there *is *res noviter* [820] *veniens in notitiam* (I do not at present inquire when or under what conditions), then the plea of *res judicata* will not avail. Now here it is alleged that various matters freshly came to the knowledge of the appellants. I will not

⁽¹⁾ Court Sess. Cas., 4th Series, vol. v, p. 1125.

weary your Lordships by repeating over again what has been so clearly stated by the noble and learned Lord on the woolsack, that all that is alleged to have freshly come to their knowledge is proved to have come to their knowledge at a time when they might have pleaded it in the first proceeding before there was the determination in favor of the trustee. Secondly, there is a ground where there is a fresh *medium concludendi*; the plaintiff in the action is not obliged to join all his *media concludendi* in one suit; if he has one *medium concludendi*, and fails in proving that, he may start another, and that whether or not he knew of it at the former time, provided it be a separate *medium concludendi*.

Now, my Lords, in the court below it was doubted whether an appeal against a decision of a trustee in bankruptcy comes within this last rule, and there was at least a plausible reason suggested for holding that it is not like an ordinary action, and that the parties appealing were bound, since they did start upon it, to produce their whole case of claim, and if they had a score of different *media concludendi* to establish the fact that they could prove against the sequestration, they were bound to bring them all forward. That is one of the points which have been discussed; but it is not necessary to decide it, and I therefore say nothing more about it.

Assuming, however, that the appeal against the decision of the trustee is like an ordinary action, and assuming (what I by no means wish to be supposed to say) that in that case you may bring on a fresh *medium concludendi* although you knew of it before, there arises the question, was what is now produced a fresh *medium concludendi*?

One word I may say upon an argument which, however, was almost abandoned before the discussion was finished. The Court of Chancery decided that this contract was voidable and set it aside, and when the appellants came with the decree of the Court of Chancery, saying, The contract has been annulled and the price is repayable by Lawsons amongst others, they attempted to say, That is a fresh *medium concludendi*, and even if it were a foreign court, 821] *provided that court had jurisdiction, the Court of Session in Scotland, or a court in any other country, ought, either from comity, that is to say politeness, or as a matter of right, to give force to that judgment. My Lords, I need hardly point out that no question really arises here upon what ground a judgment of a foreign court is or is not to be enforced. Putting it upon the very highest ground, that the defendant against whom the judgment has been given

in a court having jurisdiction over him, is under an obligation to obey that judgment which will be enforced by the court in Scotland, it is equally clear here that the Phosphate Company, which had sued in Scotland, are under a perfect legal obligation to obey the decision of the Court of Session affirmed by this House as the Supreme Court of Appeal for Scotland, and it would be enough to say that that decision was entitled to equal respect. But for two reasons it happens to be entitled to very superior respect: in the first place, the Scotch judgment was given first, and, in the second place, the Scotch judgment was given in Scotland, which was the domicile, the country in which the action was brought. Therefore I take it that it is quite plain that if the decision of the Court of Chancery is to be considered as a foreign judgment, which probably it is in Scotland, no question of enforcing it arises here.

The question is entirely reduced to this one point, and this one point only, were the matters alleged new? The Phosphate Company say that in the present appeal against the second decision of the trustees they rely upon the amended bill. The new matters are very easily seen there, because they are printed on the bill in red ink. They are alleged in the condescendence upon which the parties proceeded in the present case. They proceeded upon these new matters in their bill, and the question, I apprehend, comes to be at once, Are these new matters? I think it amounts in substance to this, that it was found out, but not too late to put it in the pleadings in the previous case; that amongst other means of carrying out the fraud, the Lawsons had been parties to giving a bribe of £15,000 to Engelbach and Keir who were parties to the fraud.

My Lords, upon the question whether that is a new *medium concludendi*, or merely a piece of evidence tending to support the *former case, I am very clearly of [822] opinion that it is only a fresh discovery of evidence, a fresh ingredient tending to prove the fraud upon which they relied. I do not enter into the details upon which I found ~~that~~ opinion. They were stated first of all very clearly by Lord Shand in his judgment, and they have been since stated very clearly both by my noble and learned friend on the woolsack and by my noble and learned friend opposite (Lord Hatherley), and therefore it is not necessary for me to try to throw fresh light upon what has been three times, to my mind, most satisfactorily stated.

LORD GORDON: My Lords, I quite adopt the observation which has just been made by my noble and learned friend

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upon the other side (Lord Blackburn) that the matter has been so very clearly brought out by my noble and learned friend on the woolsack, and also by the learned judges in the court below, that no additional observation is really required in support of the judgment which has been proposed to your Lordships. I think very clearly that the judgment of the court below is generally right. I do not go into all the particulars, but I think it is substantially right, and we are doing what is quite right in affirming that judgment.

Interlocutors appealed against affirmed; and appeal dismissed, with costs.

Lords' Journals, 8th July, 1879.

Agent for appellants: *John Homes.*

Agents for respondent: *Laurance, Plews & Baker.*

[4 Appeal Cases, 823.]

H. L. (Sc.), July 21, 1879.

[HOUSE OF LORDS.]

823] *THE LORD PROVOST, MAGISTRATES, AND TOWN COUNCIL OF EDINBURGH, *Appellants*; THE LORD ADVOCATE (*ex parte* as to M'Laren), *Respondent*.

Immixing of Charity Funds—Increase of Value of Joint Estate—Proportionate Division of Profits ordered.

In 1695 a trustor settled, in connection with Trinity Hospital, Edinburgh—a charity for the support of indigent and sick persons—a sum of money secured on bonds. The interest in perpetuity was to be employed in the maintenance in the hospital of twelve poor persons; the preference to be given (1) to those of the trustor's kindred; (2) to those of his name; and (3) if these did not apply then to indigent persons generally. He appointed as the patrons the lord provost and town council of Edinburgh, and the ministers of the burgh present and to come. The lord provost, magistrates and town council were governors of the hospital, and got control of the fund in 1700, and administered it as if part of the general charity funds of the hospital, mixing the interest with the general income of the hospital, and from the mixed income defrayed the expenses which they incurred for the whole charity, without making any distinction in the accounts.

The bonds of the settled sum were paid up in 1744 and 1753, and were subsequently, with other charity moneys lent to the city of Edinburgh; and on them a great loss occurred.

Other funds of the hospital had been invested in land in 1734, and that land had increased greatly in value. The ministers of the burgh never took any part in the administration of the fund. In a question whether the settled fund, on being ordered to be separated, was to participate in the present increased value of lands purchased since 1700; and whether the ministers had now a right to be joined in the administration:

Held, affirming the decision of the court below, that (1) the fund had been so inextricably mixed with the general charity funds, that it must be taken to have participated proportionally in the increased value of the hospital funds, and that in valuing the

aggregate funds all lands purchased since 1700 must be valued and taken into account; (2) that notwithstanding the length of time during which a contrary practice had prevailed, the ministers should be joint administrators.

APPEAL from the Court of Session, Scotland, against parts of two interlocutors.

Trinity Hospital, Edinburgh, was originally a charitable foundation in connection with Trinity College Church of that city. It was founded in the fifteenth century by [824 Mary of Gueldres, widow of James II, of Scotland; but after the reformation it was reconstructed. The appellants, the lord provost, magistrates, and town council of Edinburgh, were its administrators. The object of the charity was the support of indigent and sick persons, formerly called bedesmen. Besides its original endowments, it received, at various times, numerous separate mortifications; most of which were destined for the benefit of the poor of the hospital generally; but some were bequeathed for the benefit of a limited class, or were affected by other special provisions.

In a suit at the instance of certain beneficiaries for the proper administration of its funds, the hospital has frequently been the subject of judicial proceedings⁽¹⁾, and the Court of Session has had to decide upon many questions; but the points involved in this appeal relate solely to the administration of one of the above special funds, known as the Alexander Mortification.

The mortification is contained in two writings, a principal deed and an eik⁽²⁾; both dated the 23d of October, 1695. In the principal deed Mr. James Alexander, the truster, on the narrative that certain debts secured on bonds were due to him by the Earl of Annandale and Sir James Johnstone of Westerhall dissoned "to, and in favor of Trinity Hospital." The deed, so far as material, then continues:

And to the poor thereof, after specified, and to John Miller, present treasurer and succeeding treasurers thereof, for the use and behoove and to the effect after specified ALL and HAILL the soume of fourtie thousand merks Scots, the yearly interest to be employed towards accommodating and intertaining twelve indigent personnes, viz., eight men and four women . . . qualified and applying in the manner after mentioned . . . who have been of good reputation, and have not fallen into decay through their own vice or prodigality, to be received into the said hospitall, . . . and to be

⁽¹⁾ (1864) 4 Macq., 603; Court Sess. Jur., vol. xxxix, p. 65; Scot. Law Rep. Cas., 2d Series, vol. xxii, p. 1222; and (1866), vol. iii, p. 84.
⁽¹⁸⁶⁹⁾ Law Rep., 1 H. L., Sc., 427; Scot.

⁽²⁾ An additional enumeration of sums given.

accommodate and intertain therein at the rate and expense of the other persones who are or shall be received in and entertained upon the former mortificatione belonging to the said hospitall, which at present is estimat to one hundred and twentie pundis, and the superplus of the annualrent, . . . which, at sex for the hundred, . . . extends to two hundred and fourtie merks yearlie, . . . to be equallie divyded amongst the said twelve indigent persones, being twenty 825] merks money foresaid, to ilk ane of them *yearlie . . . by and attour the ordinairie allowance of the other persones in the said hospitall, the saids indigent persons being always subject to the laws of the said hospitall.

The deed then continues:

And in caise by the frugull and verteous manadgement of the said hospitall the expense and charge of accommodating and intertaining the saids twelve persons in maner foresaid shall not extend to and exhaust the hail annualrent yearlie of the said principal soume, then, and in that caise, I doe heirby destinat, and appoynt the superplus thereof to be employed yearlie and joyned to the said stock, and the annualrent of the new stock to be employed for intertaining of more of the like indigent persones at the rate aforesaid, so far as the samen will reach.

The qualification is thus expressed :

First, those of my own kindred, friends and relatives upon father or mother side : Secondlie, those of my own surname of Alexander, who shall apply for the benefits thereof within the space of three score days nixt after any vacancies shall ocure, and that whither they be burgesses of Edinburgh or not ; and failzeing these, of such indigent persones qualified in manner foresaid, as the saids patrons underwritten shall think fitt. . . . And the ease and benefite of the said vacancies is hereby appoynted to run up and be added to the said stock, except the necessarie expenses of the burials of the said persones by whose decease the said vacancies occurs. And which modification a'wryn I doe heirby appoynt to take effect by the said patrons receiving in and admitting of the said indigent persones within the space of six months at farthest nixt after my decease.

The deed then proceeds to dispone in favor of the hospital, and indigent persons foresaid :

Treasurer of the said hospitall, and his successors in the said office of treasurer and patrons after specified, feoffees of trust and administrators for the use and behove of the

said hospitall and indigent persones forsaid, All and Hail the principal sums and securities held for the same.

Then comes a provision that,

How often the sums mortified, or any part thereof, shall be uplifted be the treasurer of the hospitall and patrons forsaid, they shall be bund and obleidged of new againe to secure, wair, bestow, and imploy the same upon sufficient and well holdine land, or other good and sufficient securitie for annualrent, payable to the said treasurer of the said hospitall and patrons thereof and their successors, . . . for the use and behove of the said hospitall and indigent persones forsaid. . . . And with this express provisione, . . . that the saids twelve indigent persones, and such as may be added, . . . shall be intertaind upon the annualrent of the said soume of fourtie thousand merks forsaid, and new stock, in caise the samen shall be augmented, and that it shall noways be in the power of the said treasurer, &c., to apply any part of the principal sum . . . or augmented stock . . . for the maintenance of the said twelve indigent persones, but that the same shall remain entire, unbroken upon, or medled with, nor *applied to any other [826 use, but to remain as a perpetuallie mortified stock to the use and behove forsaid in all generations to come.

The patrons of the mortification are thus appointed, and put under the inspection of the Court of Session :

And for the good and effectuall performance, manadgement, and right applicat'ne of this my grant and mortificat'ne, witt ye me to have nominat and appoynted, lykeas I, the sd. Mr. James Alexander, be thir presents nominate, appoynt, and earnestlie requist the Right Honorall. the Lord Provost, and bailzies and counsell of Edinburgh, and yr. successors in office, for the communitie yrof, and ministers of the said burgh, present and to come, to be the sole and undoubted patrons of this my grant and mortificat'ne : And farder, I heirby nominate, appoynt, and earnestlie in-treat the Right Honorall. the Lords of Councell and Sessione, for the time being, to take the inspectione and oversight of this my grant and mortificat'ne, that the samen be punctuallie and exactlie keeped, observed, and fulfilled be the sds. patrons and treasurer of the sd. hospitall for the time being, according to the tenor of this my present Gift and mortificat'ne in all poynts, &c.

Mr. James Alexander died in 1696.

In 1869 the Court of Session, carrying out a judgment of this House dated 1864, remitted to Mr. Macpherson, Professor of Scots Law in the University of Edinburgh, to inquire as to the property and administration of the Trinity Hospital, and to report a scheme for the future administration of the funds of the charity, "having reference to the terms of the charters, grants, and mortifications" in its favor.

In accordance with this remit, elaborate reports and relative appendices were from time to time prepared by Mr. Macpherson. The material points of these reports, as far as regards this present case, were as follows:

The funds of the hospital from the earliest period were lent by the magistrates as governors of the hospital to the magistrates as representing the burgh. And at the date of the City Agreement Act (1835) £4,500 were due, which resulted in a loss to the charity of £1,489 18s.

The funds were also invested in land. Since 1700 there was purchased the Dean estate (1739), which, under the name of Blinkbonny and Dean Park, has greatly increased in value owing to its being a capital building site. There was also purchased in 1795 five additional acres at Coatfield, and in 1828 other trifling purchases of land.

"The Alexander trust estate amounted to £40,850 merks (Scots), lent to the Earl of Annandale and Johnstone of Westerhall; they were paid up respectively in 1743-4 and 1753."

"The amount received in sterling money from the Earl of Annandale was £1,900, and from Johnstone of Westerhall 827] £544 13s." After these sums were paid *up, the whole, except about £100, was lent at various times to the city at 4 per cent. interest. "Thus the Alexander fund supplied more than half of the £4,500 on which occurred the loss of £1,489."

"The first impression of the reporter was that the Alexander deed of mortification created a separate trust, and that the fund must necessarily be kept separate in order to carry out the purposes of the trust. But he found, after examining the accounts, that after the first few entries there is no reference to the name of Alexander; and the interest of the bonds were treated as part of the general income of the hospital charity."

"It does not seem to follow from the case of *Cuthill v. Burns* (1) that, because the money can be traced, it must be treated as ear-marked, and kept separate. He thinks the

(1) Court Sess. Cas., 2d Series, vol. xxiv, p. 849.

governors did not understand themselves to be so dealing with it, unless possibly at the date of their minute in 1838." How completely they regarded the trust as merged in the general charity is illustrated by the way in which, when they came to settle the price of the Dean estate, purchased in 1739 (1734), they directed Westerhall's bond, along with others, to be called up to meet the expenses of improvement on the estate; but the treasurer did not act on the directions, and the money remained in Westerhall's hands until 1753.

"The investments actually made were not made in terms different from those applicable to the other funds of the hospital, or indicating that they were to be kept separate for the Alexander mortification." They were not, as directed by the deed of foundation, taken "payable to the treasurer of the said hospital and patrons thereof." The inference is that the governors never intended to keep the Alexander funds separate from the rest of the hospital property.

There is every reason to suppose that the full number of twelve indigent persons were on the roll in 1700; but there soon occurred vacancies. From a list made up it appeared that from 1739 to 1802 seven is the general number of inmates on the fund.

On the vacancies admitted on the face of the minutes between 1745-1750, there ought to have been in 1750 an accumulation of upwards of £300 without charging interest. For the first eleven years after 1802 there was under expenditure, over expenditure then continued till 1831. From 1832 to 1861 there never has been spent as much as the interest at 5 per cent. of the original capital, taking that as £2,270. If the accumulations are to bear compound interest there are but ten years of the present century in which the whole interest has been expended, and the whole accumulations with compound interest would amount to £8,000, which sum does not include the original capital. Even taking the account from 1832, the savings without interest amount to £813 2s. 6d., and with compound interest to £2,350.

"It does not appear that the ministers ever claimed, or even as a body heard, that there had been conferred upon them a special interest in this fund." But from 1720 to 1738 the affairs were managed by a committee on which there was always two of the city clergy, who might have had access to the trust deed if they had chosen. The committee was abolished in 1738, and since then none of the ministers have ever acted.

The reporter suggested that the Alexander fund should 828] be *separated from the General Hospital charity, and administered as a separate trust.

The appellants objected to the proposed rectification of the hospital accounts. They submitted that the presumption was that the ministers had declined this trust; but at all events that, having regard to the length of time they had exercised the patronage, they ought now to be deemed to be the sole lawfully constituted administrators:

And, secondly, that the Alexander fund ought to be merged in, rather than separated from, the General Hospital fund. The minister of the city lodged a claim to participate in the exercise of the patronage. The First Division, on the 20th of July, 1875, pronounced the following interlocutor:

Find that the funds mortified by Master James Alexander, in the year 1695, have been hitherto held, administered, and applied by the petitioners, in the same way as the funds belonging to the Trinity Hospital, and have been immixed with, and dealt with as part of, the funds of the said hospital; Find that, in terms of the said James Alexander's mortification, the funds mortified by him fall to be held and administered by the lord provost, magistrates, and council of the city of Edinburgh, and the ministers of the said city, present and to come, and to be applied, in the first place, in relief of poor persons of the founder's kindred; in the second place, in relief of poor persons of the name of Alexander; and lastly, in relief of other poor persons, all as directed by his deed of mortification, dated the 23d of October, 1695: Find that for this purpose it is necessary to ascertain the present amount of the capital of the said funds mortified by the said James Alexander, and to set apart the same, to be administered and applied as aforesaid: Find that, in the year 1700, the said funds amounted in all to £2,270, and that the said funds to that amount have been immixed as aforesaid with the funds and property of the Trinity Hospital, from an early period down to the present time, and must be held to have participated proportionately with the said funds and property in the increase of value of the aggregate funds and property, between the year 1700 and the year 1873: Remit of new to Professor Macpherson to ascertain the value of the whole funds and property of the said hospital as in the year 1700, drawing back to the said date the value of all additional gifts and legacies received by the hospital after the year 1700, on such terms as may seem

reasonable, also to ascertain and fix the amount or value of the whole aggregate funds and property as in the year 1873, and to report what is the present amount of the said Alexander fund, taken in the same proportion to the present value of the whole aggregate funds as the sum of £2,270 bears to the value of the whole hospital funds and property in 1700, ascertained as aforesaid. . . . *Quoad ultra* approve of the recommendations of the reporter, and remit to him of new to prepare a scheme for the administration of the Trinity Hospital and its funds and estate, and also a separate scheme for the administration of the Alexander mortification, &c.

*Subsequently the Court of Session further con- [829 sidered the mode in which the principle of accounting, which had been determined upon by the above interlocutor, should be carried out. And on the 19th of March, 1878, they pronounced an interlocutor allowing certain deductions, but finding, *inter alia*, that all lands purchased between 1700 and 1873 should be included in the valuation of the aggregate hospital property. The result of the two interlocutors worked out in figures would be that the Alexander mortification is entitled to be credited with a capital sum of £30,537 19s. 10d. out of the aggregate funds.

Against these decisions the lord provost, magistrates, and town council of Edinburgh, appealed to this House.

Mr. *E. E. Kay*, Q.C., and Mr. *M'Laren* (of the Scotch bar), for the appellants, contended that the finding of the court below had no foundation in fact. The main increase in the hospital funds had arisen from the purchase of the lands known as Blinkbonny and Dean's Park in 1734; but at that date the Alexander fund was wholly invested in the original securities, and were so until 1744; this fact alone took away the basis of the judgment below, namely, that the funds were immixed since 1700. Certainly after 1744 and 1753, when the capital sums of the Alexander fund were paid up, they were mixed with other moneys and lent to the city, but the identical sums forming the Alexander fund had always been traceable, and not one farthing of them had ever been laid out on the purchase of land. The terms of the trust were that the interest—failing the preferred classes—was to be applied for the benefit of indigent persons generally, but that was also the object of the Trinity Hospital charity; therefore there would have been no advantage in keeping a separate account of disbursements, so long as none of the preferred classes were refused admit-

tance; and of that there was no evidence. Finally they submitted that the funds had not been improperly mixed, and the Alexander fund ought not to participate in the present value of lands which in fact belonged exclusively to Trinity Hospital.

The ministers of the burgh had lost all right to jointly administer the fund, by long contrary usage. They relied on *Baird v. Magistrates of Dundee* (1); *Leslie v. Black* (2); 830] also cited *Magistrates of Aberdeen v. University of Aberdeen* (3); *Attorney-General v. Dean of Christ Church* (4); *Attorney-General v. Caius College* (5); *Attorney-General v. Drapers' Company* (6); *Attorney-General v. Corporation of Exeter* (7); Lewin on Trusts, 5th ed. pp. 645, 647, 648.

The *Lord Advocate* (Right Hon. W. Watson), and Mr. B. *Nicolson* (of the Scotch bar), were heard in support of the decision of the Court of Session. They intervened by virtue of the Trust (Scotland) Act, 1867, s. 16, and maintained that, ever since the appellants had obtained possession of the Alexander mortification, they had acted when investing as if doing so for the benefit of the whole aggregate funds. For more than 150 years they had dealt with the fund as part of the aggregate charity funds; and on no principle of law or equity could they now say that the Alexander fund was severally administered. The fact that this fund was locked up in bonds at the date of the purchase of Blinkbonny and Dean Park, did not avail the appellants; it was not necessary that the bonds should be reduced to money in order to participate in the advantage of the purchase.

Mr. *Kay*, Q.C., in reply.

The Law Peers having taken time to consider their judgment delivered the following opinions:

LORD BLACKBURN: My Lords, the town council of Edinburgh were the administrators of Trinity Hospital, and as such held considerable funds before the year 1696. In that year Mr. James Alexander died, having previously made a mortification to the lord provost and town council of Edinburgh and their successors in office and the ministers of the said borough present and to come. The ministers at that time did not take any steps to assert their right to join in

(1) Court Sess. Cas., 3d Series, vol. i, (H. L.), p. 6, and 2d Series, vol. xxiv, at p. 447.

(2) 9 June, 1814; Fac. Coll., vol. xvii, p. 641.

(3) 2 App. Cas., 544; affirming Court Sess., 4th Series, vol iii, p. 1087.

(4) Jac. Rep., 474.

(5) 2 Keene, 150.

(6) 4 Beav., 67; 12 L. J. (Ch.), 421; and 6 Beav., at pp. 386, 390.

(7) 2 Russ., at p. 54.

administering this mortification. The council got possession of the funds, and from the time they did so down to the making of the interlocutors appealed against, administered those funds as if *they had been mortified to them as [831 administrators of the funds of Trinity Hospital.

In a suit for the proper administration of the funds of Trinity Hospital the Court of Session had to decide a great many questions. Two, and two only of their decisions are now by this appeal brought before this House: 1. The Court of Session decided that the funds of the Alexander mortification ought to have been from the beginning administered by the council and the ministers, and not by the council alone, and that, notwithstanding the length of time during which a contrary practice had prevailed, they could not sanction it in future; and that the funds of that mortification must be in future administered, in terms of the mortifier's trust, by the council and the ministers. This was the first decision appealed against. I think none of your Lordships who heard the argument doubted that the Court of Session could not have decided otherwise, and the counsel for the appellants were not able to urge anything substantial against this decision.

But then, having determined that the Alexander fund was to be administered separately in future, there arose a question what was the fund which was to be so administered. I do not think that I can state the point more briefly than is done by the Lord President. He says:

The funds left by Mr. Alexander were invested in particular securities, and those securities were not called up or changed until about the middle of the last century, and we have distinct evidence of what the amount of the fund was at that time. Now, if we proceeded upon the principle of a strict accounting against the magistrates here as trustees, of course the way of bringing out the balance would be to charge them with this capital, as at the date when we find it in their hands, and then charge them with the income as it accrued, and let them discharge themselves the best way they could. But it rather appears to me that, in a case of this kind, and looking to the nature of the trust and the way in which it was necessarily administered, that would be too strict a principle of accounting, and while I think it is our undoubted duty to separate this Alexander fund, and secure that it shall be administered as a separate trust in all time coming, we may deal with by-gones in a way more favorable for the administrators of Trinity Hospital. The income of the fund has apparently been spent, and it has not been spent, so far as we can see, upon purposes alien to the intentions and wishes of the founder. His wishes and intentions have only been to a certain extent disregarded, that is to say, the fund has not been in the right hands of administration, and there has not been in the selection of the objects of the bounty that order of preference which he desired. But still the fair result of the evidence appears to be that, at all events for a very long period, the income of the Alexander *fund was bestowed upon poor and [832 indigent persons of the kind generally here contemplated. It was employed, along with the income of the other funds of the hospital generally, for such purposes; and therefore I cannot see that there can be, especially against a

shifting body of trustees like the magistrates and town council of Edinburgh, any responsibility for the expenditure of that income. It is not alleged that they appropriated this fund to their own purposes as individuals, or that they appropriated it to the uses of the corporation of the city of Edinburgh. If that had been so, it would have raised a question of a very different kind. But that does not appear to have been so, and therefore I incline to the opinion that, in so far as regards the past income of this fund, there is no room for any accounting at all.

But then the next question comes to be—How are we to ascertain what sum now in the hands of those trustees will adequately and fairly represent the capital of the Alexander fund? Now that is a question of some difficulty, but at the same time I think it admits of a solution. We know that the Alexander fund was invested upon two bonds, as it was originally settled by the donor himself—the one upon the Annandale estates for £1,725 17s. 8½d., and the other upon the Westerhall estates for £544 13s. of sterling money; for I am speaking now of the amount as converted into sterling money and actually paid up in the course of last century. These two sums amount together to £2,270. Now the mortification was in the year 1695, and it may certainly be assumed, without any great stretch, that that money came into the hands of the hospital trustees by the beginning of the last century, say in the year 1700. Therefore they were possessed in 1700 of this capital sum as representing the Alexander mortification. They were at the same time possessed of a very considerable estate belonging to the hospital, and it is not at all difficult to ascertain what the amount of that estate was. In that way we discover what was the relative or comparative value of those two estates in the year 1700. But it is very apparent upon the face of the report before us, and the abundant information which we have on the subject, that this joint mixed estate, consisting to a large extent of the funds and estate of the hospital proper, but also to a more limited extent of Alexander's fund, has largely increased in amount and value between the year 1700 and the present day. Now it seems to me that this estate so jointly administered having greatly increased in value between those two dates, the Alexander fund must be entitled to participate in that prosperity. Thus, supposing that in 1700 the estate of the hospital proper amounted to £10,000 in value, and the Alexander fund to £2,000 in value, making together £12,000, but that at the present day the joint estate, as it appears in the hands of the administrators, amounts to £50,000 in value, then that £50,000 must be apportioned between the same funds in the same proportion that they bore to each other in the year 1700; that is, as 10 to 2. I am taking the figures I have mentioned as entirely suppositious, not supposing they represent the entire value by any means. On the contrary, the value as we see is very much greater. Now there may be some little difficulty in adjusting the precise way in which this result is to be brought about.

He then proceeds to give various directions as to what was to be done in ascertaining the amount, which I need not further notice.

833] *No other way was suggested at the bar in which the fund, if the two were inextricably mixed up, could be apportioned except that of taking the proportion which the two funds bore to each other, and dividing the mixed fund in that proportion; and I cannot myself see any other way. But it was argued that the two funds were not inextricably mixed up. And the point which the appellants' counsel made was fairly raised by the facts as to the purchase of the Dean estate. It appears that the town council in 1734 purchased this estate for £3,675. In course of time that estate

has become part of the town of Edinburgh, and is now worth a very large sum of money, and this has been a very profitable investment. At dates subsequent to 1734, they invested funds in city bonds, and, the city having become insolvent and compounded with its creditors, this has been a losing investment.

The decision of the Court of Session is that the investments are to be taken as made for the mixed funds, and that on the figures supposed by the Lord President the Alexander fund is entitled to two-twelfths of the profit made by the profitable investment in the Dean estate, and is to bear two-twelfths of the loss on the unprofitable investments in city bonds. And the result of that will be that in administering the Alexander fund the administrators will have the management of a very considerably larger sum than what the testator Alexander had and mortified in 1695. The contention of the appellants is that the investment in the Dean estate is to be considered as made exclusively for the benefit of Trinity Hospital, and that the Alexander fund will have no share in the profitable investment, but will have to bear a share of the loss on the subsequent investments, so that the fund now to be administered as the Alexander fund will be less than what the mortifier left in 1695. This is a result which does not at the first view seem so fair and just as that produced by the decision of the Court of Session.

In order to understand the grounds on which their argument is based it is necessary to examine what the facts were.

The testator Alexander left in 1696 the funds available for his mortification invested in two bonds. The administrators of Trinity Hospital, by usurpation, became possessed of the control of both those bonds before 1734, and they in fact received the interest on *those bonds and mixed [834 the interest thus received with the revenue which they received from the property of Trinity Hospital, and from that mixed revenue defrayed the expenses which they incurred for the whole charity, without making any distinction whatever as to whether those expenses were incurred for objects proper under the terms of the Alexander mortification or for purposes proper under the Trinity Hospital charity only. This is clearly proved by the account for the year 1722, which was in process, though not printed, and which was produced at the bar during the argument. No doubt this was wrong; but, as pointed out by the President in the passage I have read, these purposes were not alien to each other, and, though wrong, this was not a wrong like what it would have been if they had appropriated it to their

own purposes. But though they treated the funds as one, the two bonds remained in specie just as Alexander left them, not called up.

When the council were completing the purchase of the Dean estate in 1739, they gave directions to their treasurer to pay for improvements upon it, and for that purpose to uplift some securities, including the bond over Westerhall for £544 13s. which was one of the bonds left by Alexander. Nothing could more clearly prove that in making that investment the council were (as far as intention went) intending to make an investment for the behoof of the whole mixed fund, which they, improperly it is true, treated as one fund. But the treasurer did not follow these instructions. In his account, after showing what the whole disbursements in paying for the Dean estate and improvements on it had been, and that there remained a balance of £465 18s. 5d. unpaid, he adds this :

	£.	s.	d.
"The the accomptant was authorized by the council to uplift £544 13s. st. contd. in Sr. James Johnston's hereble bond to the hospital to replace the above charge which, as it was well secured, and the interest duly paid, he judged it more for the interest of the hospital to uplift only the sum due by Mr. John and Mr. Charles Cockburn, their bond being £200 stg., and the meantime to advance the rest himself,	200	0	0
"Balance due to him on acct. of the inclosing ..	265	18	5"

Consequently the two bonds remained in specie not called up for some years later. The argument founded on this 835] was, that as *the bonds remained in specie and earmarked as it were, and as it appeared that the estate of Dean was in fact paid for out of funds originally belonging to Trinity Hospital and uplifted for that purpose, it followed as a matter of law that, whatever the council intended, the funds must be followed, and that the Dean estate belonged exclusively to Trinity Hospital. According to this reasoning, if the treasurer had obeyed his instructions the Alexander fund would have been entitled to share in the Dean estate in the proportion which £544 13s. bore to the whole cost. As he did not they are to have no share in it.

This makes the question depend entirely on an accident, and is not a satisfactory result, still if the law was settled that it was so we must follow it. But I do not think there is any case, either in England or Scotland, in which such a question has been raised

No doubt when the question has been whether those who represented the trust could claim property on the

ground that it was procured by trust funds which they had a right to follow, the identity of the fund is all important. But such a case as the present as to an investment has never, that I can find, been raised.

In *Pennell v. Duffell* (*) it might have been raised, but those entitled to the different estates which then were proved to be jointly entitled to the fund very sensibly settled the proportions in which they were entitled without going to law about it.

Being therefore, as I think it is, a new question, it must be settled on principles of justice. Speaking for myself alone, I should have had great difficulty in deciding this case if it had come before me as sitting in the Court of Session. I doubt whether I should have had acuteness enough to discover the mode in which the Court of Session have solved the difficulty. But they have solved it in a way perfectly consistent with justice and good sense, and not inconsistent with any technical rule of law, and no other solution has been suggested which would be so satisfactory. I certainly, therefore, am not prepared to advise your Lordships to reverse the judgment below, especially seeing that I am not prepared to advise your Lordships to adopt any other rule.

I move, therefore, that the interlocutors below should be affirmed, and the appeal dismissed with costs.

*LORD HATHERLEY: My Lords, I have had the advantage of seeing in print the opinion of the noble and learned Lord who has just addressed your Lordships, and I have nothing to add to the statement of facts therein contained.

It appears that the first unfortunate step which was taken in this matter, erroneously, although no doubt in perfect good faith, was the exclusion of the ministers who were particularly pointed out in Alexander's mortification to be joint trustees with the corporation of Edinburgh of the fund that he left for the purposes, under certain limitations, of Trinity Hospital. The ministers being shut out from it, the fund was administered entirely by the provost and council of Edinburgh. This circumstance, no doubt, led to the confusion which afterwards took place in the accounts. The provost and council of Edinburgh were properly trustees of Trinity Hospital, and they had several other mortifications also which were made over to them for Trinity Hospital; and this Alexander mortification appears in a sense to have been one also for the benefit of Trinity

(*) 4 De G. M. & G., 372.

Hospital, or rather for the benefit of the persons who were to be received therein, that being a charity. It was limited, however, in its operation by certain rules with reference to the kindred of the founder. He was particularly anxious that those kindred should be admitted to it, and that until they failed, the fund should be used for that purpose. However the provost and council of Edinburgh placed all those funds which they held in any way for the benefit of Trinity Hospital in one common stock, as it were, and kept one common book of accounts with relation to them.

I asked once or twice during the argument whether there was any separate account kept anywhere of the Alexander mortification, and was answered that the report of Mr. Macpherson was in this respect perfectly correct; that the funds of the Alexander mortification had been "immixed" with the other funds held by the corporation in trust for the hospital. The consequence of that was that all the funds, including the Alexander mortification, have been dealt with as one common fund to be administered, as the provost and council might think proper, for the benefit of the hospital. This is not a case, as was remarked in the court below, and as has been remarked again just now by my noble and [837] learned *friend, in which any improper motives have actuated the corporation, that is to say, the provost and council of Edinburgh, as trustees. They no doubt thought that they were performing their duty in doing that which they did; but at the same time the consequence has been unfortunate, because it has become necessary to separate these funds which are held on separate and distinct trusts; and, it being necessary to separate them, the question is how is that to be done now, when, according to the report of the referee, Mr. Macpherson, the funds have become inextricably immixed? My Lords, a very hard struggle was made, by Mr. Kay I think, upon that part of the case, namely, with reference to the funds being capable of being still pointed out as separate and distinct. Now up to a certain time there was truth in this. The corporation became masters of the fund, as it is stated, about the year 1700. As far as appears from the report or the evidence they were at that time masters of the fund, which consisted of two heritable debts due from the Annandale estates and another estate connected with them, the separate sums amounting together to the sum which was mentioned in my noble and learned friend's statement. Those debts were not gathered in until certainly after the year 1734 or 1735, in fact not until after 1740, and the purchase of the Dean

estate was made at a period anterior to their being so called in, but the interest on those bonds was received and was credited to the common fund before that time. We have had an opportunity of seeing the accounts for one year, and it appears that the payments were made entirely in a mixed and unseparated form, indifferently from the interest of one fund or the other, or from the interest of one or of all the funds which were held by the provost and council of Edinburgh. My Lords, that being the case, it became impossible from that time to separate the interest, as Mr. Macpherson tells us, and of course we looked to the counsel for the appellants to make out if they could that Mr. Macpherson was wrong in that respect, and that the interest could in fact be separated. No attempt, however, has really been made, or if it has been made it has not been successful, to show that the interest of these funds was at any time kept separate and distinct. In due time afterwards the capital was gathered in, and what became of it? It may partly be traced to the debts which pressed upon the corporation I apprehend, and it may partly be [838 traced for a certain time to certain other payments; but after a time the funds became so inextricably immixed that there is no mode of separating them.

The appellants say, At all events, the corporation did not take the funds of the Alexander mortification for the purchase of the Dean estate, which is a source of profit to the corporation, they did not use them for the investment in this Dean estate, which has turned out well for those who engaged in it, and we must keep these funds entirely separate from that advantageous purchase, inasmuch as we can show you that the identical funds which might be followed out as being what you were entitled to, could not possibly have been laid out in the purchase of the Dean estate. In the events which have happened it would certainly be very much worse for them if they were taken to be left in the general body of the fund, and so lost. What the court seems to have regarded the corporation as having done may be described thus; if I may use an expression which bears more analogy to this than any other expression one could use, a sort of partnership was formed by these trustees between the various trust funds which they held. They considered that they were justified in acting in the manner they did for the benefit of the hospital. They said, We will carry all these into one joint stock concern, for better and for worse; and accordingly, although there have been some alternations, the investment which was made by these

trustees, improperly constituted in a sense, but still trustees of this particular fund, has turned out to be a beneficial investment.

Now, my Lords, I apprehend that what the court below has done is only that which is commonly done in this country with reference to partnerships. The question came more frequently before our courts at one time than it does now, because the principle is better understood. At one time—a long time ago—if a partner died leaving assets in the partnership, and the other members remaining in the partnership after his death carried on the business with his assets, there was felt to be a difficulty in coming to any arrangement as to what would be the correct mode of dealing with that fund. It was a recognized rule at all times that a *cestui que trust*, whose property has been improperly dealt with, has the choice of accepting the dealing with his property or repudiating it; that is, either of taking all the 839] profit (he would *not choose it, of course, if there had been loss) resulting from the dealing with his property, or requiring the payment back of his money with such interest as the court thought right under the circumstances. There was found to be a difficulty about applying that to partnerships for some little time, but the principles of partnerships were discussed in the cases of *Brown v. De Tas-tet* (1), and in the case of *Wedderburn v. Wedderburn* (2). When the principles were discussed in those cases it was said that the difficulty having arisen in this way, inasmuch as something must be allowed for labor and attention and activity in the business, such remuneration, for instance, as the managing partner or a person somewhat in that position might be entitled to—the court did not see its way to direct a simple account of the profits without more. However, in those cases it came to be settled at last that the proper course is to allow an account of all profit made since the death of the partner, and to give his estate a share of that profit according to the capital on the one side, and to debit his estate on the other side with “just allowances,” which of course includes everything which the court might think just and proper. The principle was that the trust money having been used in the partnership concern, and profits having resulted from that use of trust money, no attempt should be made to separate all the different funds out of which money might have been paid but the share of profits upon the trust money so used was to be ascertained according to the capital employed.

(1) Jac., 284.

(2) 2 Keen's Rep., 722, aff'd., 4 Mylne & Craig, 41.

That, my Lords, is exactly what has been done here. It is a kind of partnership concern which has been carried on by the provost and council with their various trust funds. The whole of the trust has made a profit, that profit the court below has held ought to accrue for the benefit of that charity the funds of which came into the hands of these trustees about the year 1700, as far as can be made out upon the evidence, as well as of the other trust funds held by the same trustees. That is the principle upon which the court has directed that the apportionment should be made.

Now, my Lords, in the case of a partnership, supposing it were necessary to lay out any money for the purpose of increasing the business during the time when the business was carried on with *the aid of the deceased part- [840 ner's assets in conjunction with other assets of the partnership, supposing it was necessary for the erection of a new building—take a brewery, for example, or the like—to make payments, and profits were so earned, the court would not be very strict to inquire out of which particular fund the money which was laid out arose, because when funds are employed jointly in this way you can hardly say that payments are made out of one fund rather than out of another fund. Here, curiously enough, there is a strong illustration of that in the entry which has been read by my noble and learned friend near me, from which it appears that it was actually intended at one time to apply these very funds to the particular purchase which was made of the Dean estate. But really, that does not in substance make a difference if the whole concern has been carried on in a joint and mixed manner, if the whole funds have been invested for the purposes of the whole concern, if I may so term it. Believing, as the corporation did, that the whole was one concern, it was upon the faith and confidence of their having certain assets in hand, of which the heritable bonds in question formed part, that they made the purchase which otherwise they would not have ventured to make for the benefit of the trust; any more than, if it had been an actual partnership, the partners would have ventured to make such a purchase for the benefit of the partnership unless they had funds in hand.

Now, my Lords, from about the year 1700 the provost and council have had these £2,000 odd of the Alexander mortification, and the interest upon it was at first very punctually paid, as the entry which has been read shows, although afterwards the state of things was different. The question arises after a long series of years in which this mistake has

been made, for a mistake it has been held by the court below to be, and that can hardly be disputed. The result of this long mistake is that happily, as things have turned out, the whole concern of this trust administered as one concern has been fortunate, the Alexander mortification partook in a speculation for which the funds of the concern were used, and it has been held by the court below to be entitled to an equitable share of the profits so realized; that is what it comes to. I have taken the Dean estate as the principal instance, because that appears to be the principal instance of 841] profit; but that is not *the only instance, or the only instance of profit, it is a salient instance. A *cestui que trust* has a right, when his fund has been dealt with in an illegitimate manner as regards the true legal construction of the bequest, to say at his option whether he will have a decree for the restoration of the fund with or without interest in the meantime, or whether he will take the result of the employment of that fund when it has been employed together with other funds in a payment resulting in an acquisition of profits by taking a share of those profits. The remedy is given to him in either case on account of the impossibility, when funds have been mixed, of attributing to each a particular property, and ear-marking it as belonging to the one rather than the other. And although you may say at such and such a time the Dean estate in particular could not have been bought with this particular fund, because these bonds were not then gathered in and collected, still the interest had been gathered in, and the interest had been applied, as Mr. Macpherson says, in ease of the other funds to some extent. He says they were sometimes in excess, and sometimes in deficiency; at all events, at certain times they were in excess. It was one common fund, and the *cestui que trust* does not now ask to have his part of that fund followed and pursued, and to have his trust moneys divided from the rest, but he asks what common justice seems to require, namely, that he should have a right to participate in that which has followed from the use of his money together with the other moneys, taking his share out of that joint and common stock. I think the *cestui que trust* has a right to do that.

My Lords, I will only add to what my noble and learned friend has said that in this decision I think we are in no way departing from, on the contrary, it approves itself to my mind as a way of carrying into full effect, the rule which is common in cases of this kind, namely, that a *cestui que trust* whose funds have been dealt with without his consent has a

right to take the result of that dealing in the manner most favorable to himself. I think, therefore, my Lords, that the order suggested by my noble and learned friend is the correct order for us to make.

LORD GORDON: My Lords, in regard to the first question raised under this appeal, viz., whether the ministers of Edinburgh are entitled *to participate in the adminis- [842 tration of the Alexander mortification, I entertain no doubt at all. The terms of the deed of mortification are quite distinct and unambiguous. It nominates and appoints the "Right Honorable the Lord Provost and bailies and council of Edinburgh, and their successors in office, for the community thereof, and ministers of the said burgh, present and to come, to be the sole and undoubted patrons" of the mortification. The ministers of the burgh "present and to come," are appointed, equally with the lord provost, bailies, and council, and their successors in office, patrons of the mortification, and I entertain no doubt that the ministers were entitled from the institution of the mortification to participate in its administration.

But it is said that, as the ministers have not taken part in the administration of the mortification from its institution in or prior to the year 1700, they have now lost their right to participate in the management. I think this is a mistake. I agree with the Lord President that "the circumstance that the ministers of Edinburgh have never claimed to be conjoined in this administration is of no consequence. No persons of an official character can give away the rights of their successors in office under a trust of this kind, and therefore the trust must be constituted and administered now as provided by the truster in his deed of mortification."

I think that the cases of *Baird and others v. The Magistrates of Dundee* (¹) and *Leslie v. Black* (²), which were relied on by the appellants, are inapplicable to the circumstances of the present case. In *Baird v. The Magistrates of Dundee*, the mortification was in favor of the provost and bailies of Dundee, but from the institution of the trust in 1845 the affairs of the mortification were managed, not by the provost and bailies alone, but by the provost, bailies, and town council. And it was decided by this House in 1863, when the question was raised, "that, having regard to the length of time during which the provost, bailies, and town council of Dundee *per se* administered the charity, they ought to be considered as the lawful trustees of the interest represented

(¹) Ct. Sess. Cas., 8d Series, vol. i (H. L.), p. 6; 2d Series, vol. xxiv, p. 447.

(²) 9 June, 1814, Fac. Coll., vol. xvii, p. 641.

by Johnstone's legacy." The case of *Leslie v. Black* did not come to your Lordships' House. But the point decided by that case was that where a minister and members of a 843] kirk session *who were appointed, along with others, as patrons of a mortification had, for more than a century, voted collectively as one person in the administration of the trust affairs, they were not entitled to vote *per capita*, but must continue to vote as they had formerly done. In both of these cases the question was in regard to the intention of the testator, and the usage was only important as showing the contemporaneous interpretation put on the terms of the deed of mortification accepted and acted on for long periods of time. But there is nothing in these cases to indicate that in a case such as the present, where there is a clear and distinct nomination of certain official persons to act as patrons, the failure for a length of time of these officials to perform their functions would deprive their successors of the rights so distinctly conferred upon them.

The remaining part of the case in regard to the mixing of the funds of the Alexander mortification with those of the Trinity Hospital and the proper mode of the separation of these funds is attended with more difficulty. But on a careful consideration of the whole matter I have come to be of opinion that the result arrived at by the Court of Session is right. I have had an opportunity of perusing and considering the judgment which has just been delivered by my noble and learned friend Lord Blackburn; and as his Lordship has gone fully into that part of the case, and as I concur in the views which he has expressed, I shall not detain the House by entering on details.

I am of opinion on the whole matter that the judgments of the court below are right, and they should be affirmed.

Interlocutors appealed against affirmed; and the appeal dismissed, with costs.

Lords' Journal, 21st July, 1879.

Agents for appellants: *J. & J. Graham.*

Agent for respondent: *T. B. Simson* (Crown Agent).

[5 Appeal Cases, 1.]

H. L. (E.), February 9, 1880.

[HOUSE OF LORDS.]

***EDWARD LOUIS HOOPER and H. F. HOOPER, *Appellants*; and JOHN BOURNE, THE WESTBURY IRON COMPANY, and THE GREAT WESTERN RAILWAY COMPANY, *Respondents* (*).**

Railway—Superfluous Land—Onus of Proof—Presumption.

A railway company purchased, by private agreement, without any preliminary notice to treat, certain lands, in amount nineteen acres, under which were mines of iron ore. These mines were specifically conveyed to the company. By the private act incorporating the company the railway was to be finished in 1851. By warrant of the Railway Commissioners that time was extended to 1853. The company had used six of the nineteen acres in railway works—on certain spots of the remaining thirteen acres a drain, a cesspool, and a passage for water supply had been constructed, but no buildings had been erected, nor rails laid down. The railway was finished, but at the expiration of ten years from 1853 no sale of the lands took place. In December, 1849, the company had let the lands to a tenant from year to year, and he used them for agricultural purposes. In August, 1871, the company let the lands (again under a tenancy from year to year) to an iron mining company under a license to work the iron ore. In each of these agreements the directors reserved the absolute right (in the case of the iron company upon twenty-eight days' notice), to re-enter on the lands, and in the lease to the iron company the mining was to be done subject to the approval of the railway company and of that company's engineer. In 1875 an action of ejectment was brought to recover the lands as lands which, under sect. 127 of the Lands Clauses Act, 8 & 9 Vict. c. 18, had vested in the plaintiffs as "adjoining owners." There was a reference to a barrister to state a case for the opinion of the court. The case set forth in one of the paragraphs, that since 1868 the railway traffic had much increased, and that the lands "had been, and still were, required for the purpose of constructing additional sidings upon them to accommodate the increased traffic," and gave reasons of business which had influenced the railway directors in not making these sidings. The Queen's Bench Division had held that under these circumstances the lands were not to be considered as "superfluous land" which became vested in the adjoining owner—and that decision was affirmed by the Court of Appeal:

Held, that the decisions of the courts below must be affirmed.

In a case of this kind the burden of proving a title to the land, as superfluous land, lies upon the claimant.

The mere fact that the land has not been built upon is not conclusive—all the circumstances must be considered.

The fact that the lands were in the neighborhood of a populous town was a circumstance to raise a presumption that the lands would be wanted on account of increased traffic on the railway.

And, *semble*, that the fact that they were so wanted in 1868 raised a reasonable presumption that in 1863 the want of them for railway purposes had been foreseen.

Per THE LORD CHANCELLOR (Earl Cairns): If a railway company purchases land and the minerals under its surface, and the surface is not at that time wanted for the purposes of the railway, but afterwards becomes so, and cannot be used without requiring the support of the minerals, *quære* whether there is any authority which requires the company to sell the minerals apart from the land, or, in default of such sale, vests them in the adjoining owner.

(*) Affirming 28 Eng. R., 236.

1880

Hooper v. Bourne.

H.L. (E.)

Per LORD HATHERLEY: Questions as to superfluous lands have proceeded, at all times, upon the *bona fides* of the transaction.

Per LORD O'HAGAN: An actual present intention to employ the land for the purposes of the railway need not have been formed within the prescribed time, in order to prevent a forfeiture at the end of it.

EJECTMENT (brought in May, 1875), for certain pieces of land in the parish of Westbury, in the county of Wilts, situated close to the Westbury Station of the Great Western Railway.

The case came on for trial at Salisbury, and was then referred to Mr. Kingdon, Q.C., who stated a special case for 3] the opinion *of the court (¹). The facts were in substance these. In 1845, an act was passed for incorporating a company called the Wilts, Somerset, and Weymouth Railway Company, for the purpose of making a railway from the Great Western Railway to Salisbury and Weymouth. With this act the Lands Clauses and the Railways Clauses Acts were incorporated. An amendment act was passed in 1846 specially referring to the making of a railway in the parish of Westbury, the time for the completion of which was to expire in August, 1851. By warrant under the seal of the Commissioners of Railways this time was extended to August, 1853.

By an indenture dated in March, 1848, the freehold and inheritance in fee simple in two pieces of land in Westbury parish, containing about nineteen acres, belonging to two persons named Rossiter, as trustees for the Rev. J. Hooper and his wife, were conveyed to the Wilts, Somerset, and Weymouth Railway Company, together with the mines under and the timber on them, for the sum of £3,280, and this sum was to be in full satisfaction for all works for the accommodation of lands adjoining the railway, and for all gates, bridges, fences, &c., and all severance and other damage. The land thus acquired was delineated on the parliamentary plans and book of reference. Shortly after the completion of this purchase (which was made by private agreement, and not under any statutory notice to treat), the company took possession of the lands, and upon part thereof, consisting of about six acres, constructed the Westbury Station and certain roads necessary for the accommodation of the traffic. There was a cottage upon part of the land, and this cottage from 1850 to 1875 had been occupied by the company's servants. Two pieces of land,

(¹) The special case is fully set forth in the report before the Court of Appeal, 3 Q. B. D., 258. The name of the case as it stood in the court below has been pre-

served, but the only real respondents were the directors of the Great Western Railway Company.

which were marked as Nos. 1 and 2 on a plan, were separated from another piece marked No. 3 on that plan, by a public highway leading from Westbury to Storridge, and were separated from the plaintiff's land by a public highway leading from Westbury to Hawkridge. These highways had been set out under an inclosure act award in 1808. On these pieces of land some drainage works *had been done, [4 and a cesspool had been constructed and a passage for the supply of water made. By an agreement dated the 24th of December, 1849, the Wilts, Somerset, and Weymouth Railway Company let the three pieces of land, Nos. 1, 2, and 3, to one James Bourne on a tenancy from year to year, and he used them for farming purposes. The agreement contained a provision for the re-entry of the railway company and its agents upon the lands, "for the purposes of the railway act, or for any purpose connected with the said railway," upon giving two months' notice in writing. This tenancy of Mr. Bourne came to an end.

The railway was completed in 1853. By an agreement, dated 18th of August, 1871, the Great Western Railway Company (which had before then, by force of a private act of Parliament, become entitled to the property as successor to the Wilts, &c., Company) let the said three pieces of land to the Westbury Iron Company on a tenancy from year to year, such agreement being subsidiary to a license, which, by an indenture dated two days previously (August 16, 1871), the Great Western Company had granted to the Westbury Iron Company to work the iron ore under the land. The license, dated the 16th of August, 1871, stated that "the railway company being of opinion that the removal of the iron ore from the said first mentioned pieces of land will not interfere with, or prevent the user of the said pieces of land for the station and siding accommodation and other the purposes of their railway and the works connected therewith, for which the same are now, or are intended to be, used, provided the working and removing the said iron ore be done to the satisfaction of their engineer for the time being, and the holes occasioned by the removal thereof be filled in with slag, and resealed, as is hereinafter provided, have agreed to grant the iron company the required permission upon the terms and conditions hereinafter contained." The iron company covenanted "throughout the term, as directed by, and to the satisfaction in all respects of, the engineer" of the railway company, to search for the iron ore, to leave such margins as might be required by the company or engineer, to remove the soil in

a particular manner, and to preserve the same for the purpose of being again laid thereon, and to the satisfaction of the engineer to make good the slopes, fill up and level all 5] holes, &c. The agreement *contained the following provision: "In the event of the railway company requiring the whole, or any portion, of the said premises for any purpose whatsoever, they shall be entitled to take possession of the same, and put an end to the tenancy upon giving twenty-eight days' notice in writing, and they may by themselves, their agents, and servants enter upon the said premises without their being deemed trespassers for so doing, or being liable for any damages occasioned thereby." The license contained a like provision.

The Westbury Iron Company had occupied the three pieces of land under the license and the agreement, and had worked the iron ore according to their stipulations.

The 14th paragraph of the special case was in these terms: "Since the year 1868 the railway traffic at the Westbury Station has much increased, during that period of time the said three pieces of land have been, and still are, required for the purposes of constructing additional sidings upon them to accommodate the increased traffic. The want of such additional accommodation was, during the period aforesaid, a subject of frequent discussion between the several district officers of the Great Western Railway Company having the general supervision of the traffic at the Westbury Station, but—in consequence of general instructions from the general manager of the railway company, that, as the company were expending large sums of money upon other works, district officers were not to ask for anything that was not necessary, or could possibly be postponed—no requisition was made by the district officers to the company, during that period, to provide such additional accommodation, nor did the company during that period provide, or take any step to provide, additional accommodation, and, except as hereinbefore mentioned, the said three pieces of land have during that period remained, and still remain, in the same state as they were up to the end of the year 1868."

The special case stated that "in the year 1863 the plaintiffs were, and still are, the owners of certain lands which adjoined the portion of the nineteen acres of land upon which the railway and works were constructed."

The case then quoted the 127th section of the 8 & 9 Vict. c. 18, that "with respect to lands acquired by the promoters of the undertaking *under the provision of this or the special act, or any act incorporated therewith, but

which shall not be required for the purpose thereof—be it enacted—within ten years of the expiration of the time limited by the special act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands,” and apply the money, &c., and “in default thereof, all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in, and become the property of, the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same.” The case also referred to the two acts of the Great Western Railway Company, the Act of 1866, s. 6, and the Act of 1868, s. 20, containing similar provisions, then stated the contention of the plaintiffs and defendants, and submitted to the court (which was to have the same liberty as a jury to draw inferences of fact) the question “whether under the circumstances hereinbefore set forth the plaintiffs are entitled to recover possession of the whole or any part of the said lands claimed by the writ.”

The Queen’s Bench Division answered that question in the negative, and that answer was confirmed by the Court of Appeal. This appeal was then brought.

Mr. *Benjamin*, Q.C., and Mr. *Merewether*, Q.C., for the appellants: The court below has treated land purchased by a railway company under a private agreement, as being in the same position as land obtained under the compulsory clauses of the Railway Acts. The question therefore arises whether a railway company can buy land and hold such land forever, or whether the holding of land obtained by the company by voluntary purchase, is not restricted, like the other, to the use and purposes of the railway. Then, if mines acquired by the company are not required for the purposes of the railway, are they not to be treated as the surface of the land is, that is, as superfluous? If so, then the provisions of the Lands Clauses Act and the Railway Clauses Act must be taken to apply to these lands, and the consequence must follow that the lands the subject of this action, having become “superfluous lands,” have vested in the appellants. All purchases of land made by railway companies must be made with a view to, and for the [7 purposes of, the undertaking, and for them alone. The Legislature never intended railway companies to be the owners of lands except so far as they were necessary for such purposes. And most certainly it was never intended that they should become owners of mines in perpetuity. When it is ascertained that lands are not required for the

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purposes of the railway, they become by that fact superfluous lands, and must be sold, and if not sold they vest, within a time specified by the statute, in the adjoining owners. The facts here showed that the lands now in contest were not required for the purposes of the railway. Nineteen acres of land had been purchased, only six acres had been used, and the remaining thirteen acres had been let, first of all, to a person who used them as a farm, and then to a mining company, with power to dig out the iron ore lying under the surface. These acts of the company showed that the surface of the land itself was not required for the purposes of the railway, and brought this case within the authority of that of *The Great Western Railway Company v. May* (*), in which the Lord Chancellor gave the definition of what must be considered superfluous lands. He said (*), adopting the words of the 127th section of the Lands Clauses Act, that they were "lands acquired by the promoters of the undertaking but not required for the purposes thereof." That exactly described the lands in this case, the conduct of the directors showing clearly that they were not so required. There is no such finding here, as in *Betts v. The Great Eastern Railway Company* (*), that "the land was purchased solely for the purposes of the railway and had ever since been retained *bona fide* for such purposes," and that case, therefore, is inapplicable to the present.

The railway here was originally to be completed in 1851. The time for completing it was extended to 1853. It was then completed, and, from that date, the time began to run in which, if the lands were not used for the purposes of the railway, they must be sold, or they would vest in the adjoining owners. They were not sold, and there was not a particle of evidence to show that between 1863 and 1868 they had ever been deemed to be required for the purposes of the railway. The case stated by the arbitrator set forth that from 1868 the increasing traffic of the railway showed that the lands might be required for railway purposes, but that was a period of five years after the time at which they ought to have been applied to those purposes, or to have been sold. The fact that 1868 was fixed on as the

(*) Law Rep., 7 H. L., 288; 10 Eng. R., 38.

(*) Law Rep., 7 H. L., at p. 292; 10 Eng. R., 45.

(*) Law Rep., 8 Ex. 294; 3 Ex. D., 182; 31 Eng. R., 212. That case came up to this House, where the finding of

the jury was treated as conclusive upon the fact, and so no point of law was really determined. See *Weekly Notes*, November 8, 1879. See also on this subject, *London and South-Western Railway Company v. Blackmore*, Law Rep., 4 H. L., 610.

time at which the increasing traffic on the railway begun to raise the presumption that the lands might be wanted for railway purposes showed that, until that time, there had been no good ground for such a presumption. The natural meaning of the finding in the 14th section of the case was that for five years after the ten years following the completion of the railway, the company had no need nor intention of using the lands for railway purposes. If a man said—I have had some land for five years and now I think of building on it,—he in effect said, that during those five years he had never entertained that intention. It lay on the directors to show that after 1863 and before 1868 they had intended the land to be used for railway purposes, but they had not shown any thing of the kind, and the 14th paragraph distinctly pointed to an opposite conclusion. It was not enough for them now to say that after 1868 circumstances had suggested that the lands might be wanted for the purposes of the railway.

Then as to the mines⁽¹⁾.

Mr. Davey, Q.C., Mr. Arthur Charles, Q.C. (Mr. Fletcher Moulton was with them), for the respondents, were not called on to address the House.

THE LORD CHANCELLOR (Earl Cairns): My Lords, several questions have been argued in this case by the learned counsel who have presented the case to your Lordships on behalf of the appellants, but it will not, in the view [9] which I take of the case, be necessary to refer to more than one of those questions. If it turns out that the land which is here sought to be recovered is not "superfluous land" within the meaning of the Lands Clauses Consolidation Act, the other questions which have been argued in the case become immaterial.

My Lords, the action is brought in the year 1875 to recover against the Great Western Railway Company certain closes of land, three in number, which are alleged to be superfluous land. The plaintiffs (the appellants), who seek to recover the land, allege that they are, and for the purpose of the present argument (and for that purpose only) I will assume that they are, the "adjoining owners" who would be entitled to recover the land, if it be superfluous land.

⁽¹⁾ The questions whether the appellants had made out a title as adjoining owners, and what were the rights which a railway company might acquire and exercise in the purchase of mines, were discussed by the appellants' counsel, and on the latter point the *Great Western*

Railway Company v. Bennett (Law Rep., 2 H. L., 27) was referred to; but the judgment was confined to the questions whether the lands were superfluous lands, and whether the appellants had made out any title to recover them.

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The case of the plaintiffs, therefore, is one in which they seek to establish, I will not say a forfeiture of the land, but, at all events, that the land has been divested out of the railway company in which undoubtedly it was vested, and has become vested in the plaintiffs. The case of the plaintiffs must be that this divesting from the railway company and vesting in the plaintiffs took place in the year 1863. The case, my Lords, therefore, is one in which the plaintiffs have to recover upon their own title, and they have to show, affirmatively, that, as a matter of fact, the land in question had become at the date which I have mentioned superfluous land; and, until they establish that fact, they do not advance their case. The mere circumstance that at one particular period the land was unbuilt upon, or unused for the purposes of the railway, will not be material, at all events will not be conclusive. It must be shown affirmatively that, within the meaning of the act of Parliament, it had become at the date I have mentioned superfluous land, that is to say, "land not required for the purpose of the railway company's undertaking."

The case did not go before a jury and therefore there is no finding of a jury on the subject. By the agreement of the parties a special case was stated, and the court was at liberty, by the agreement of the parties, to draw inferences on the question of fact from the statements made in the special case. I will refer your Lordships to one of those statements, the statement in paragraph 14:—[His Lordship read 10] it, see *ante*, p. 5]. Your Lordships *have this statement positively made,—it is common ground therefore, between the parties in the case,—that, since the year 1868, these pieces of land have been, and still are, required for the purpose of constructing additional sidings upon them to accommodate the increased traffic. There is no doubt therefore as to what was the case in 1868.

Upon that, the first observation I make is this, that if the question had been presented for solution before a jury, or any other tribunal of fact, in the year 1863, it is quite possible that a controversy might have arisen as to whether in the development of the traffic of the company these lands would be required for these additional sidings, and at that time, perhaps, there would not have been a possibility of predicated what was predicated in the year 1868, that the increase of traffic necessitating these additional works had actually taken place. That may be so; but there is a very strong presumption which arises when you find that in 1868, without its being said that there was any unexpected, un-

natural, casual, or fortuitous development of traffic, but merely that the traffic had developed so as to require this additional siding accommodation,—there is, I say, the strongest presumption that those elements were at work in the year 1863, and that any person with proper foresight, properly acquainted with the way in which railway traffic does develop, would have said, and would have said rightly, in the year 1863 that these pieces of ground would be required for the development of the traffic which afterwards took place. As your Lordships well know, it is not at all necessary that at the end of the ten years there should have been then the immediate possibility of employing, or the immediate necessity for employing, the pieces of land for the additional work. It would not have been superfluous land if it could have been reasonably said at the end of the ten years, that there was a purpose for which, even after that period, it would be required in connection with the railway. That is the first observation.

But a second observation is this; these pieces of land were not pieces of land adjacent to, or in the neighborhood of, a railway in some wild and unpopulated part of the country, but they were three pieces of land immediately contiguous to a station, which itself was a station of a populous town. Therefore without any *evidence on the subject, without any statement in the special case, your Lordships, or any tribunal taking notice of facts which are notorious, and within the knowledge of every person, would naturally conclude that there was a strong presumption that land taken by the railway company immediately around its station, near a populous town, was land as to which there was strong probability at all events that it would be required for the purposes of an extension of the station accommodation of that place.

My Lords, that is a second circumstance; but there is a third. Your Lordships find that in the documents which have dealt with this land for temporary purposes, a document for example which leased it to the first person who was in occupation of it, a person of the name of Bourne, and the documents which afterwards dealt with it (although the latter are documents dated after the expiration of the ten years),—in all those documents the directors of the railway in speaking of the land, speak of it always as land as to which there was the probability that it might at any time, and at very short notice, be required for the purposes of the railway, and take care while putting the land into the occupation of other persons, to reserve to themselves the power of

reclaiming it upon short notice for the purposes of their railway undertaking.

Now, my Lords, bearing in mind that it is, as I have already said, for the plaintiffs to establish their case, and to show that at the end of the ten years the land was superfluous land, I take leave in the first place to say that they have not shown that fact by any affirmative evidence of their own, and that, on the other hand, the positive statement in the case to which I have referred—a statement no doubt relating to 1868, but reflecting back upon the year 1863—and the other considerations which I have mentioned, go in my mind very far indeed to show, even if the *onus* had been upon the railway company, that this land was not superfluous land or land not required for the purposes of their undertaking. Therefore, my Lords, so far from differing from the conclusion arrived at by the Court of Queen's Bench, the tribunal which the parties selected for the purpose of determining in the first instance this question of fact, I am bound to say for myself that had the case been presented to [2] me in the first instance, I should have arrived at the same conclusion. I understand that in the Court of Appeal all the judges did arrive at the same conclusion, some of them no doubt expressing their opinions more strongly than others, and I see no reason to differ from any of those opinions.

My Lords, I will only say one word on the subject of the mines. It was attempted by Mr. Benjamin to make a distinction between the mines or minerals under these closes of land and the surface of the closes themselves. Now the facts of the case as to that are simply these. The minerals were bought by the railway company along with the lands. I asked this question in the course of the argument;—if a railway company buys a close of land with the minerals under it, and if it afterwards turns out that the surface of the close itself is required for the purposes of the railway, but that those purposes could be answered without preserving to the surface the mineral support in the usual way, is there any authority that the railway company is bound to sell the minerals apart from the surface, and that in default of being so sold, the minerals would vest in the adjacent owners. I could not learn that there was any authority for that proposition. But whether that be so or not, that is not simply the case here, because it is perfectly apparent here, from the documents which form part of the case, that the opinion of the railway directors was that, although it would be safe, and would be consistent with the purpose for which

these closes were wanted, that some portion of the minerals under them might be taken away, the agreement by which permission was given for this to be done, reserved to themselves, through their engineer, the control of the manner and the form in which, and the extent to which, these minerals should be taken away. They therefore reserved the power and the authority to regulate the extent to which the support of the minerals should be taken from the land in a way that they could not have done if they had sold the minerals absolutely apart from the surface.

My Lords, I therefore think it is impossible here to make any distinction between that part of these closes which was subjacent, consisting of minerals, and that part of the closes which was merely surface land.

On the whole I submit to your Lordships that there is no ground for dissenting from the judgment of the court below, and *I will move your Lordships that the appeal should [13 be dismissed with costs.

LORD HATHERLEY : My Lords, I am of the same opinion, and so entirely for the same reasons that I do not think it necessary to detain your Lordships by expressing my view on this case at any length.

It appears to me that the plain object of the Legislature in these clauses that have been commented upon, in reference to these superfluous lands, has been this. It is a very high act of authority, and one only to be justified by the public advantage which is thereby secured, to insist on a landowner selling his property and parting with his estate for the purpose of having a railroad made over it, which is to be in itself such a public benefit as is supposed to justify the interference with his rights. The Legislature conceiving, and in my view rightly conceiving, that to be a matter in which the greatest moderation should be used with reference to the interests of all parties concerned, has provided that companies making these works shall not, under pretence of the benefit they are about to confer on the public, acquire to themselves property which can be dealt with in any other way than for that specific public purpose for which alone they were authorized to take it. Therefore clauses have been introduced into the general acts, by which, the time for the execution of the works being limited, the company is bound within a period of ten years after that time to sell all that land which it does not want ; or, in default of selling it, and to induce the companies to sell it, clauses are put in with reference to (it cannot properly be called a reverter) the handing over of the lands to the adjacent owners. Who

are the adjacent owners it is not necessary to decide in the present case.

That being so, my Lords, it appears to me that the cases, which have been numerous in various shapes, as to superfluous lands, have simply proceeded at all times on the *bona fides* of the transaction; and the question is therefore always peculiarly a subject for consideration by a jury. There have been cases in chancery where injunctions have been applied for before the land was taken, on the ground that it was impossible that the land could be required, or that notice had been given to take a much greater quantity of [4] *land than could be required for the purposes of the railway. That is a much more difficult case than the case which arises afterwards when the works have been executed. But the question having arisen in different forms it all comes round to this result, whether or not the companies are proceeding *bona fide*, and whether or not the land is actually wanted for the execution of the undertaking which they have in hand.

Now, my Lords, what do we find in this case? We find a fact upon which my noble and learned friend on the woolsack has observed. But before coming to that, I will add, that where the directors, having entered into a contract, have acquired land, and there is no suggestion of *mala fides*, and there appears to be no reason in the world why they should have attempted to take the land, except for the particular business they had in hand, they have been held entitled to retain it. They would, naturally, not be desirous of taking more land than they wanted if they were acting *bona fide*. But besides that, as my noble and learned friend has said, you have it found by the special case, which is equivalent here to a verdict, the judges being empowered to draw such inferences of fact as they may think warranted by that statement of facts, that after the making of the railway and in the period between the expiration of the ten years and the taking of the present proceedings, the land, in consequence of the development of traffic, has become necessary and is now necessary for the purposes of the undertaking. There appears to be no direct evidence on the subject, but that is the finding. That seems to me to answer the question at once, because, as I took the liberty of saying to Mr. Benjamin during the course of his argument, it seemed to me that his argument throughout assumed that, though, when the plaintiffs in the present case took their proceedings, they had found the land in question covered with railroads and tramroads crossing each other for the purposes

of a station, and had found it in daily use for sidings, and had found a largely increased traffic coming into the station, they would nevertheless, because of the mere lapse of time, have been entitled to say that the land was superfluous, in the face of the very strong inference that must arise from the fact of its being largely used and beneficially used at the then present time. A strong inference would arise in *such a case that it was land that was required for the [15 purposes of the undertaking, because all traffic admits of development, and for the purpose for which this land had been acquired having been, at all events as regards part of it, to use it for the purpose of a railway, you find the whole of it at the moment of the dispute arising in the case I am supposing, so covered with a network of railways as to be assisting the growth of that traffic, and assisting it profitably and beneficially to the company, and the public. Yet according to Mr. Benjamin's argument you are to say, All that is to come to an end, because, although I did not choose to stir ten years ago, ten years ago I might have stirred, and if I had stirred ten years ago, you would not have been in a condition to say what you now can say, that it was then wanted for the development of your traffic. The fair inference is that it was wanted from the first, unless you can show that this development was something preternatural, and not a mere ordinary development of railway traffic. Of course, cases of that kind might be conceived. All that would have a bearing upon the subject I first mentioned, namely, the *bona fides* of the company in taking this land. A very strong inference is to be drawn from the facts stated in the case that it was from the first intended for that object which it appears during this long period from 1863 has been attained by it.

My Lords, it also appears to me that, so far from the various instruments and deeds which have been executed affording any inference that there was a *mala fides* in this transaction, or that the company did not want this land to develop the traffic, every one of them seems to have a contrary bearing. There is a power reserved for determining the arrangements which have been entered into; and what could that be for, except because the directors say, "We think we shall or may want the land, and if we do want it we may take it again, else we should not put in any such stipulation." In a case of this description, where there is so much that may be considered conjectural, and where the work has first to be executed, you must leave a considerable margin to the judgment of those who undertake the work

as to what would be the best mode of developing it, and how much, when it is so developed, they may want for the development.

16] *That being so, I really think we have here everything to justify the inference which the learned judges in the court below have unanimously drawn from the facts now apparent on the case before us, and the conclusion is not one which admits of dispute, unless some question could be raised upon that subject on which Mr. Benjamin laid great stress to-day in his argument, namely, the question of mines as distinguished from other parts of the property. The finding in the 14th paragraph of the special case is one which seems to me in fact to carry, to its full extent, the justice of the inference that has been drawn by those learned judges. For the reasons already assigned by my noble and learned friend, the Lord Chancellor, which I have scarcely done more than repeat for my own satisfaction, as I have wished to state some of the reasons which occurred to me as supporting the decision the learned judges have arrived at, I think it was a right decision. In the first place, the inference they have drawn is, in my opinion, only a just inference from the statement of the case in the 14th paragraph, and from the dealings of the railway company in reference to this property. It is true they have not built over it, and it is not to be found in a state of utility at present; but the whole argument we have heard to-day might have been justly urged to the same extent and the same degree if it had been found to have been covered with works at the time when this action was brought. That was not the case; but I think there is nothing whatever to authorize a suspicion or a doubt that that which has been done from the year 1868 down to the present time has been a reasonable development of the original purpose of the railway company, and that this was during the intervening time (including the year 1863) a purpose which at some distant time might be carried into effect, and which it seems has been carried into effect during the period referred to in the 14th paragraph.

The learned judges have relied upon that in coming to the conclusion they have come to, that this land cannot be held to be superfluous land. I think that the proof of its being superfluous really lies on the plaintiffs. They have no title whatever, and can pretend to no title whatever, unless the land be superfluous, and therefore, in the face of the total absence of any evidence on their part that it was superfluous

17] from 1863 to 1868, with the *finding that from 1868 it

never has been superfluous, and there always has been an intention to use it, I think that there is made out a very strong ground for thinking that the railway company really wanted it from the first. There is not a tittle of evidence on the part of the plaintiffs to show that it is superfluous land, beyond the mere fact that the railway directors have never executed works upon it. But I must assume that it is still within the competency of the railway company to carry such works into effect, in order to fulfil the statement of facts in the 14th paragraph, namely, that it has been from 1868, and is now, land that is not superfluous. There is not any evidence, therefore, before us to the contrary, which ought to lead us to depart from that view or from the just inference to be drawn from that statement, namely, that what was wanted in 1868 was wanted at a period earlier than that, because clearly, in the purview of the parties undertaking the work there was in this, as there is in every railway case, a notion of a development of traffic which alone induces parties to enter into these undertakings at all. That development of traffic has in fact taken place: and this being, and having been from that time (1868) downwards, land which is not superfluous, I do not see what single point I can put my finger upon in the plaintiffs' case to justify me in coming to a contrary conclusion from the views which have been taken by the other learned judges who have considered the subject.

LORD O'HAGAN: My Lords, I concur with Lord Justice Bramwell in thinking that this is an action "which ought not to have been brought" (*), and I see no sufficient reason for dissenting from the unanimous opinion of the judges of the Court of Queen's Bench and of the Court of Appeal, in favor of the defendants.

Reaching the conclusion, in common I believe with all your Lordships, that the land which is the subject of dispute cannot, upon the evidence, be held to have been "superfluous" at the end of the ten years, I do not deem it necessary to discuss the questions which have been raised as to adjacent ownership, and the conveyances of mines and minerals.

*It seems to me that, on the 3d of August, 1863, the [18 day to which, according to the decision of this House in *The Great Western Railway Company v. May* (*) our attention should be directed,—the land which the plaintiff claims might reasonably have been dealt with, on an examination

(*) 3 Q. B. D., at p. 272; 28 Eng. R., 236.

(*) Law Rep., 7 H. L., 283; 10 Eng. R., 38.

of the state of the railway, and a fair estimate of its capabilities of development, and the works which the profitable use of them might involve, as "required" for the purposes of the act within the meaning of the 127th section.

I cannot adopt the view which was somewhat pressed in the argument, that an actual present intention to employ the land for those purposes must have been formed by the company within the prescribed time, to prevent a forfeiture at the end of it. I think it is enough, if, though no such intention was consciously formed or explicitly formulated, the circumstances of the railway indicated a probable development, and a requirement of farther accommodation within an ascertainable and reasonable period. If the want of an express intention to undertake a specific work in the month of August, 1863, forfeited the interest of the company and transferred it to the adjoining occupier, the latter might have lain by, as he has done, for a long series of years, the company might have gone on with large and expensive works, and he would have been entitled to come in after their completion and secure them as his own. This would not be just or reasonable: and nothing in the statute compels us to such a conclusion. I adopt the words of Lord Justice Brett as expressive of the view I have taken of the statute. "In my opinion," he says (¹), "the real meaning is, can the tribunal which has to try the case say, at the time when the case is tried, that if all the facts existing on the last day of the ten years had been known to a reasonably skilful and careful person, he would have said, at that time, that the lands in question would, by the ordinary development of the railway or neighborhood, be required to be actually applied to the purpose of the railway within a reasonable time?" And this I repeat, although at that period there was no present, definite, or formal resolution so to apply them.

The question before the Queen's Bench was one of fact. 19] The *judges had the same powers of drawing inferences as a jury would have had. They exercised that power, and found that in August, 1863, the land in controversy was required for the purposes of the railway, although it had not then been dedicated to them. I need not repeat the reasons which have seemed to my noble and learned friends, and seem to me, to make this finding satisfactory. The burden of proof, as has been said, is on the plaintiffs. They seek to work a forfeiture and to disturb a possession, and they are bound to establish that the land they seek to ap-

(¹) 3 Q. B. D., at p. 282; 28 Eng. R., 236.

propriate is "superfluous land" not required for the purposes of the act. They have failed to do so. During the great lapse of time since the railway was completed, the company has not utilized the land, and this has been fairly urged as leading to the inference that, not having been used, it cannot be said to have been "required." If the action had been brought immediately after the expiration of the ten years, it might have been more difficult to answer that argument.

When a company purchases land, after full consideration, on the advice of competent engineers, and with ample information as to its probable requirements, it may be fairly, in the first instance, presumed to have taken only what its real interests compelled it to take. The Legislature, for very good reasons, has fixed a period within which the correctness of its judgment in this respect may be tested, and at the end of the ten years any such presumption is done away, and the lands not then "required" are to be sold or to go to the adjoining owners. A new presumption then arises on which the appellants might properly rely, but in the case before us this is encountered by positive evidence of a very persuasive kind. It has been found by the Special Case (paragraph 14, *ante*, p. 5), first, that since the year 1868 the railway traffic has much increased; secondly, that, during that period of time, the three pieces of land have been required for the purpose of constructing additional sidings upon them to accommodate the increased traffic; and, thirdly, that they are still required for that purpose. Is it reasonable to say that if the land was "required" in 1868, and is still "required," it was not so "required" in 1863? Railway traffic does not increase largely in a day or a year, and skilled persons can foresee and determine beforehand the changes of accommodation which its increase may [20] probably necessitate. Can we suppose, looking back at the state of things in 1863 with the light reflected from 1868, that the managers of the railway company did not anticipate some changes like those which so soon after made the land essential to the line? Or, whether they did or did not so anticipate, can we suppose that, in fact, the necessity, although only to become real in the near future, would not have been held by any official of competent experience, knowing the condition of things, to have then had potential existence? We are not bound to look only to the case which might have been made on either side if the action had been brought earlier. We have facts established from which it may be inferred that in 1863 the land was "re-

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quired," as it was in 1868 and has been ever since ; and that all who were conversant with the affairs and the prospects of the railway must, or might, have known it to be so.

The inactivity of the directors since 1868 has fairly been relied on ; and, if there were any question as to their *bona fides*—a consideration, as has been observed by my noble and learned friend (Lord Hatherley), of great importance in cases of this kind—it would have had material claims to our attention. But the special case explains the delay in providing the additional accommodation, showing that it was the subject of frequent discussion amongst the officers of the company, and that it was not supplied because of pecuniary complications created by a large expenditure upon other works.

The lettings for agricultural and farming purposes can scarcely be used adversely to the respondents, as the leases all contain provisions for the resumption of possession by the company upon short notice, and are, therefore, rather evidence of a continuous purpose to use the grounds demised, for railway purposes.

On the whole I think that the judgment should be affirmed, and the appeal dismissed with costs.

LORD BLACKBURN: My Lords, I am of the same opinion.

In this case the railway directors had purchased a plot of land about nineteen acres in extent with the minerals under it, and on that plot of land they might construct works for the purposes of the undertaking ; but ten years after the 21] time limited for making *the works, that is to say, on the 10th of August, 1863, such lands as they then held as were not required for the purposes of the undertaking, were to vest in the owners of the adjoining lands. Now when that time, the 10th of August, 1863, arrived, the railway company had erected a station upon the spot, and had made the railway and made some works, which together occupied about six acres out of the nineteen. Between twelve and thirteen acres of the land which was purchased there, were not yet used for any purpose of the railway, and the question comes to be, was it land which was no longer required for the purposes of the undertaking? or, in the other phrase which is used in the act of Parliament, was it superfluous land? That was a question of fact at that time.

One can see that there are several things to be considered upon that. First of all, there is no doubt that the fact that the lands had not been used, although more than ten years had elapsed since the time when they were purchased, was evidence to suggest the conclusion that they were not re-

quired. There is also no doubt that inasmuch as we all know that a station is peculiarly a place where the extent of land that may be required for buildings, and for sidings, and for other things, is likely to increase with the traffic, the fact that this land was adjoining to a station was a reason for saying that it was very likely that the land might be wanted for the purposes of the railway, although if the same plot of land had been situated elsewhere alongside the railway, very far from a station, it would be hardly conceivable that it ever should be required at all for the purposes of the undertaking. That was also a question to be considered.

But all these matters had to be considered, as they appeared on the evidence at a later time, by the tribunal which had to decide the fact. I quite agree that the fact to be decided was, were these superfluous lands on the 10th of August, 1863? But that was to be decided upon the evidence produced before the arbitrator who was settling the case, and that was in the year 1878. Fifteen years had elapsed, during which many things had happened, and many things had become clear which would not have been clear, but would have been speculation in 1863. Had the action been brought and the matter required to be decided in the year 1863, the railway company must have called witnesses to *say, "We expect that the traffic will increase, we ex- [22 pect that this will happen, or that that will happen." But, in fact, the question came to be decided in 1878, when fifteen years had elapsed, when new things had happened; and some of these things are things which make in favor of its being superfluous land, and some make against it. I may say that the fact that fifteen years more had elapsed during which the land was not used for buildings or for sidings, is strong evidence,—as strong as any the plaintiffs had,—that it was superfluous land.

On the other hand, there was also a minor thing with regard to the minerals during these fifteen years. Beginning in 1871, the directors had utilized the land for the purpose of working out the minerals underneath it. They had sold the minerals to a company to work them out upon the terms which were alluded to by my noble and learned friend the Lord Chancellor, and which I shall not repeat. If it can be supposed that that was evidence which led those who had to draw the inference of fact, to the conclusion that the land was kept for the purpose of working mines, and not *bona fide* for the purposes of the undertaking, that would be evidence that they were superfluous lands. I can

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only say, for my own part, I do not think there is the least ground for saying that it was kept for the purpose of working minerals. I think the company kept the land under the belief, whether rightly or wrongly, that it would be used at a future time for the purposes of the undertaking, and the directors thought only to get what could be got from the minerals in the meantime, and I do not see that they are in the slightest degree to blame for that.

Then, on the other hand, comes what is to be said for the defence, upon which I not only so far agree with the court below that I cannot disturb the finding, but I must say that I should have come myself, independently, to the same finding. I think when that is shown, which has been proved, namely, that in 1868 and from 1868 down to 1878 the state of things existed which is mentioned in paragraph 14 of the case stated by the arbitrator, and which in substance amounts to this: that during these last ten years it has been ascertained as a fact, and I, the arbitrator stating the case find as a fact, that, although the lands are not now used, it is quite certain they will be wanted at some reasonable time for the purposes of the undertaking—when that 23] is found with *regard to 1868, I think it throws very great light upon what took place in 1863. It may be that the evidence in 1863 would not have convinced a jury of what the evidence in 1878 did convince the arbitrator, but when you find that during the last ten years it has been quite ascertained that the lands were wanted, I think it is very reasonable to draw the inference that in the five years from 1863 to 1868 they were so wanted too, unless the contrary is shown. I do not say that it is conclusive, but I say it is reasonable to draw that inference.

For myself I confess I should be inclined to go so far as to say, without hesitation (though Mr. Benjamin thought it would be a monstrous conclusion), that wherever it is shown that lands have not been actually claimed by adjoining owners until some years after the time when they might have been claimed as superfluous, but still remain in the hands of a railway company, and they are required for the purposes of the railway at the time when they are claimed, it is a reasonable conclusion that the *onus* of proof is shifted to the other side. No doubt in such a case the adjoining owners claiming the land may be allowed to prove that which generally they will find it very difficult to do, namely, that it was not wanted at the time when the ten years began. It is not necessary, however, to go so far as that in the present case. I think, in the absence of evidence to the con-

trary, since it is shown that in 1868 the lands were required, it is a reasonable inference that they were required in 1863 also.

My Lords, I will only add one word as to the minerals. The railway directors did here what they were not bound to do. They might have bought the land, leaving the minerals severed from it in the hands of the vendor. They agreed (it matters not why) as they might do, to purchase the lands and the minerals together, so that the lands were not severed from the minerals. I see Lord Justice Bramwell says (') that he thinks even if the surface was not required for the purpose of the railway, and therefore was superfluous land, some sort of severance may be made so that the defendants may keep the minerals, although the surface of the land may have to be returned to the owners of the adjoining lands. That is not the case before the House, and it is not necessary to decide anything with respect to it, but I must say that I should *pause very long before I came to that conclusion. [24 sion. I doubt it very much.

The real question here is the converse of that; it is the question raised by Mr. Benjamin in his argument. He says, even if it be established (as for the reasons I have given I think it is established) that the surface was required for the purpose of the railway company's undertaking, you are to say you will sever the minerals below from it, and that they must be sold, and that they vest in the owners of the adjoining land. That would be, I think, a very inconvenient result, and I certainly can see nothing whatever in the sections which were quoted by Mr. Benjamin from the Railways Clauses Act, to point to any such conclusion as that. What is there said is, that companies need not buy the minerals until they find that it would be dangerous to the undertaking if they do not buy them, and then they may buy them, but there is nothing whatever said to the effect that they shall not buy them before; still less it is said that if there be any minerals in the land which belongs to companies, which they have actually bought, they must sell those minerals independently, whatever mischief it may do to their undertaking. I confess I cannot see any reason for making such an enactment, and Mr. Benjamin did not succeed in pointing to anything in the act of Parliament which seemed to me to amount to that. I believe I am not wrong in saying that there is no case in which there is a decision or *dictum* of authority pointing that way; certainly I think the case of

(') 3 Q. B. D., at p. 278; 28 Eng. R., 236.

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The Great Western Railway Company v. Bennett ⁽¹⁾ in this House does not point that way.

Therefore, my Lords, as I have said, I think the fact was rightly found below, and that being quite enough to decide this question, I do not think it necessary to give an opinion on any of the other points which have been urged.

Judgment appealed against affirmed; and appeal dismissed with costs.

Lords' Journals, 9th February, 1880.

Solicitors for appellants: *Field, Roscoe, Field, Francis & Osbaldeston.*

Solicitor for respondents: *R. R. Nelson.*

⁽¹⁾ Law Rep., 2 H. L., 27.

See 31 Eng. Rep., 224, note.

[5 Appeal Cases, 25.]

H. L. (Sc.), Feb. 13, 1880.

[HOUSE OF LORDS.]

25] *LIVINGSTONE, *Appellant*; THE RAWYARDS COAL COMPANY, *Respondents* ⁽¹⁾.

Coal Mine worked by Mistake beyond Boundary—Compensation—Evidence of the Measure of Damage—Royalty—Surface Damage—Way-leave.

A. was the owner of a small feu of about an acre and a half in extent. The surface of the ground was occupied by miners' cottages, and underneath was coal. When A. purchased the feu, he was under the impression that all the minerals under the feu, as under all the ground surrounding it, had been reserved to the superior; but that was a mistake, for in the deed granting the feu there was no reservation of coal. The superior granted the whole property in the coals in all the surrounding land to R. and C. They, under the impression that they had the whole of the coal, including the coal under the acre and a half, worked out and disposed of the coal under A.'s acre and a half; and in doing so damaged the surface.

A. could not have worked the coal to profit himself; there was no person to whom he could dispose of it but to R. and C.; and the element of wilful trespass, and the element of special and exceptional need of support to the surface, were absent.

In a claim by A. for (1) the value of the coal; (2) a sum for "way-leave" and the advantage obtained by working through instead of round the feu; and (3) for damages done to the houses on the surface:

Held, affirming the decision of the court below, that the value of the coal taken must be the value of the coal to the person from whom it is taken, at the time it is taken, and that the best evidence in the peculiar circumstances of this case of that value was the royalty paid by R. and C. for the surrounding coal field; therefore A. was entitled to the lordship on the coal excavated, calculated at that rate; together with the payment of a sum for damage done to the houses on the surface.

Held, also, that as the question of "way-leave" was not argued before the First Division of the Court of Session, it could not be entertained in this House.

The principle of *Jegon v. Vivian* (Law Rep., 6 Ch., 742) sustained.

⁽¹⁾ Affirming Court Sess. Cas., 4th Series, vol. 6, p. 922; 16 Scot. L. Repr., 530.

APPEAL from the First Division of the Court of Session in Scotland.

In 1837 Mr. Gavin Black, then proprietor of the lands of Rawyards, near Airdrie, Lanarkshire, feued out a small portion of land, namely, 1 acre 30 falls and 21 ells, to the Monkland Iron and Steel Company. By the feu disposition the grantor specially *reserved to himself, his heirs and [26 successors, the whole ironstone in the ground feued ; but the deed contained no reservation of coal.

In 1869 the appellant, Mr. James Livingstone, purchased the feu, and some thirty miners' cottages, which covered the surface, for £80, from the Monkland Iron and Steel Company. The appellant appears to have been under the impression that all the minerals under the feu, as under all the ground surrounding it, had been reserved by the superior.

In 1871 Mr. Gavin Black died, and was succeeded by Mr. John Motherwell, the present proprietor of the lands of Rawyards. He, in the belief that all the coal on the estate had been reserved, granted in 1872 a lease of the whole property in the coal—as far as this appeal is concerned—to the respondents, the Rawyards Coal Company, at a royalty of 6*d* per ton. They, just as the appellant was ignorant of his rights, were ignorant of theirs ; for they believed they were the owners of all the coal, including the coal under the appellant's feu. Accordingly, in the ordinary course of their working, and between May, 1871, and May, 1876, they wrought out and removed the coal under the appellant's acre and a half, to the amount of 5,895 tons. When this was done, and the coal disposed of, it was discovered what the real titles were, through the appellant examining his titles for the prosecution of a claim for surface damage ; for the respondents in working under the acre and a half had, by letting down the ground, caused damage to the miners' cottages. The question under these circumstances came to be, what was the measure of damages the appellant was entitled to. It was admitted that what was done, was done in perfect ignorance, and that there was no bad faith nor sinister intention on the part of the respondents. The appellant in his action claimed (1) the value of the coal, under the deduction of proper allowances for raising the same ; (2) a sum for way-leave, in respect that large quantities of coal had been carried from the adjacent coal field through the appellant's feu ; (3) damages done to the miners' cottages. The respondents, admitting they had taken the appellant's coal, tendered in discharge of the action £450

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27] 10s. This offer being *refused by the appellant, the Lord Ordinary (¹), after a proof, found, June 10, 1878, *inter alia*,

"That the coal removed from the pursuer's (appellant's) fen by the defenders (respondents) consisted of 4,800 tons or thereby of free (or common) coal, 1,275 or thereby of dross, and 320 tons or thereby of gas coal, in all 5,895 tons or thereby; and the value of these at the pithead, according to a reasonable calculation of the market value, was as follows: common coal, at 6s. per ton, £1,290; dross, at 1s. 6d. per ton, £95 12s. 6d.; and gas coal, at £1 3s. 11d. per ton, £382 13s. 4d.; thus amounting in all to £1,768 5 10

"(b) That a fair price for working the said coal may reasonably be fixed at 4s. 3d. per ton over head, this sum including everything except lordship and capital charges, the amount at this rate being in the aggregate 1,252 18 9

"And leaving as free profit or value in the hands of the defenders, derived from coal belonging to the pursuer, the sum of £515 12 1

"In the second place that the pursuer is entitled to recover the said sum of £515 12s. 1d. from the defenders: finds pursuer entitled to the expenses of process, &c."

The Lord Ordinary disallowed the appellant's claim for damage to his houses by subsidence of the surface, holding that was a loss which the appellant must necessarily have incurred had he himself worked out the coal. The Lord Ordinary also rejected the claim by the appellant for "way-leave," amounting to £33 6s. 8d., calculated at the rate of about 2d. per ton; and the appellant's claim for £110 9s. 8d., as the amount alleged to have been saved to the respondents by working through, instead of round the appellant's feu. And these claims were not mentioned by the appellant's counsel when the case was argued before the First Division. The respondents being of opinion that the Lord Ordinary had misapprehended the nature of their contention, and had greatly underrated the expense of working the coal, presented a reclaiming note against his decision. The First Division, on the 20th of May, 1879, reversing the Lord Ordinary's interlocutor, found that the appellant was entitled to £171 7s. 6d., being the amount of lordship on the coal excavated, calculated at the rate paid by the respondents to the superior for the surrounding coal field, 28] with, in addition, a further sum of £200 as *compensation for damage done to the houses on the surface. In respect of the tender their Lordships gave the respondents their costs from the date of the said tender (²).

Mr. *Davey*, Q.C., and Mr. *Guthrie Smith*, for the appellant, contended that he was entitled to the value of the coal after deduction of the cost of severance and bringing it to the surface. Here the value of the coal was the free profit

(¹) Lord Craighill.

vi, p. 922; Scotch Law Rep., vol. xvi,

(²) Court of Sess. Cas., 4th Series, vol. p. 530.

made by the respondents. The appellant was content with the Lord Ordinary's finding; but the judgment of the First Division was in effect to compel the real owner of the coal to receive a royalty, giving the whole profit made to the trespassers. That finding was not consistent with the principle of *Jegon v. Vivian* ⁽¹⁾ and the earlier cases. Where the coal is taken by fraud or negligence, the proper estimate of damage is the value of the coal when gotten, without deducting the expense of getting it: *Martin v. Porter* ⁽²⁾, *Wild v. Holt* ⁽³⁾, and *Phillips v. Homfray* ⁽⁴⁾. But where taken by mistake, and an encroachment under title, a milder rule prevails, though in *Morgan v. Powell* ⁽⁵⁾ the defendant was not allowed the cost of the severance of the coal. So in *Wood v. Morewood* ⁽⁶⁾, a case at *Nisi Prius*, Parke, B., told the jury that if they thought the defendant was not guilty of fraud or negligence, but acted fairly and honestly, in the full belief that he had a right to do what he had, they might give the fair value of the coals as if the coal field had been purchased from the plaintiff. The jury found that there was no fraud, and estimated the damages accordingly. That case was the precedent for the principle on which *Jegon v. Vivian* ⁽¹⁾ was decided: see also *Hilton v. Woods* ⁽⁷⁾, remarks of Malins, V. C. ⁽⁸⁾; *In re United Merthyr Collieries Company* ⁽⁹⁾.

The value of the coal taken was the profit admittedly gained by the respondents, but the court below thought the question of *the profit realized by the trespasser not of [29 the least relevancy. If that judgment is right then the real owner would be wrong in claiming his own coal lying at the pit's mouth, for it would be a sufficient answer for the trespasser to tender the lordship. The fact ought to weigh that the appellant did not want the coal removed, on the contrary it was of great value to him having a firm foundation in a county so honeycombed as Lanarkshire.

[LORD BLACKBURN: The court below decided this case on the peculiar circumstances that no one could work this coal at a profit unless he had the facilities of the respondents.]

It was no answer that the appellant could not have worked the coal himself. He was entitled to have the chattel taken, restored, or, if that was impossible, then the profit made out of it must be handed over to him.

⁽¹⁾ Law Rep., 6 Ch., 742.

⁽²⁾ 5 M. & W., 351.

⁽³⁾ 9 M. & W., 672.

⁽⁴⁾ Law Rep., 6 Ch., 770.

⁽⁵⁾ 3 Q. B., 278.

33 ENG. REP.

⁽⁶⁾ 3 Q. B., 440 n.

⁽⁷⁾ Law Rep., 4 Eq., 432.

⁽⁸⁾ Law Rep., at p. 440.

⁽⁹⁾ Law Rep., 15 Eq., 46; 5 Eng. R.,

707.

The appellant was satisfied with the amount awarded by the court below for surface damage, but submitted he was also entitled to the clear profit made out of the coal.

They further maintained that a sum should be allowed the appellant for "way-leave," or for the advantage reaped by the respondents by working their tramways through, instead of round the feu.

[EARL CAIRNS: That question was not argued before the Inner House, and it is not usual to argue points in this House that have not been argued before the court below.]

On the whole matter they submitted that the appellant was entitled to the profit made, and to costs.

Mr. *E. E. Kay*, Q.C., and Mr. *Gloag*, maintained for the respondents—putting aside the compensation for surface damage—that all the appellant was entitled to was the value of the coal *in situ*; that principle was laid down in both *Wood v. Morewood* (') and *Jegon v. Vivian* (*). The question was not what the trespasser made of the coal, but what the owner *could* have made of it. The appellant had no right to follow the coal; nor was the profit made on it by the respondents any test of its value *in situ*. The circumstances here were most peculiar,—the appellant could not sink a shaft and work the coal himself at a profit; nor was there a single person he could sell the right of working it to, except the respondents; and the appellant's own surveyor advised him to take the ordinary royalty given for the coal in the neighborhood. Therefore the value of the coal to the appellant was accurately given by the Court of Session, and the principle of the cases cited had been applied.

Mr. *Guthrie Smith*, in reply.

EARL CAIRNS, L.C.: My Lords, there are two minor points in this appeal which I may mention in the first place, for the purpose of putting them on one side. I mean the question of an allowance for way-leave, and the question of an allowance for what is termed the advantage obtained by working through, instead of round, the feu of the appellant. Both those points were insisted upon before the Lord Ordinary; but when the matter came before the First Division, the contest of the appellant with regard to those points does not appear to have been renewed; and, therefore, to enter upon them now would be in substance to entertain in this House an appeal from the Lord Ordinary, and not from the First Division.

(') 3 Q. B., 440 n.

(*) Law Rep., 6 Ch., 742.

Upon the main question which has been argued the case is one of some peculiarity. The appellant is the owner of a small feu of about an acre and a half in extent near Air-drie. The surface of the ground is occupied by miners' cottages or houses, and underneath there was coal. When the appellant bought the feu some time ago he appears to have been under the impression that the minerals under this feu, as under all the ground which surrounded it, had been reserved by the superior. In point of fact that was a mistake. The superior kept in his hand the minerals under all the ground around, but under this acre and a half the coal had not been reserved in the grant of the feu now owned by the appellant. The appellant, therefore, although he did not know it, was the owner of the coal under this acre and a half of ground. The superior granted the whole property in all the surrounding *land to the company who are [31] the respondents, and they, just as the appellant was ignorant of his rights, appear to have been ignorant of theirs. They appear to have been under the impression that they had the whole of the coal, including the coal under the acre and a half. They had the coal which surrounded the acre and a half, but they had not the coal which was underneath the acre and a half. In the process of their working they worked out the coal under the acre and a half, and when that was done it was ascertained (it is unnecessary to observe how the discovery came to be made) what the real titles were, and that this coal really belonged to the appellant, and did not belong to the respondents, who had got it and disposed of it. I ought to add that in working under the acre and a half of ground they had, by letting down or cracking the ground, caused some damage to the miners' cottages which stood upon the surface of the acre and a half.

Now, my Lords, under these circumstances the question arises, what is the measure of damage to which the appellant is entitled? We may put aside some elements which might occur in some cases, but which do not occur in the present case. There is absent here the element of any wilful trespass or wilful taking of coal, which the person taking it knew did not belong to him. What was done was done in perfect ignorance, and there was no bad faith or sinister intention in that which was done. We may put aside another element which might have occurred. It might have been the case that the support of the coal under this acre and a half of ground had been of some peculiar advantage or benefit to the appellant, for which no money would compensate him. Either by

some use made of the surface, or by some specific use intended to be made of the surface, there might have been a peculiar need for the support of the minerals underneath, which might either have made it impossible to estimate the damage, or might have made the estimate of the damage exceptionally high. Neither of these elements occurring—neither the element of what I will call wilful trespass, nor the element of special and exceptional need of support—the case is one in which your Lordships have simply to ascertain what is the ordinary measure of damage for the coal taken, or what, in other words, is the value of the coal that was taken.

32] *Of course the value of the coal taken must be the value to the person from whom it was taken, because I do not understand that there is any rule in this country, or in Scotland, that you have a right to follow the article which is taken away, the coal which is severed from the inheritance, into whatever place it may be carried or under whatever circumstances it may come to be disposed of, and to fasten upon any increment of value which from exceptional circumstances may be found to attach to that coal. The question is, what may fairly be said to have been the value of the coal to the person from whose property it was taken at the time it was taken.

I own that it appears to me that the Court of Session have adopted a principle which is not unsatisfactory for the purpose of ascertaining that value. They have said, The value to this appellant is not the value which he could have derived from himself working the coal and taking it into the market, because he could not have worked it; the area is so small that it would have been impossible for himself to have worked and used the coal, and earned a profit, or put an additional value upon the coal by so working it; he must have gone to some person, or waited till some person came to him who had the power of working the coal from adjacent working; therefore (say they) the value is that which he could have obtained from somebody else who would have come and taken the coal as it stood *in situ*, and who would have worked it and turned it to account. Then they go to the witnesses of the appellant, and they must take Mr. Rankine, his principal witness; and I observe that another witness of the same stamp and character as Mr. Rankine immediately follows, who wishes his testimony to be taken as repeating Mr. Rankine's *in omnibus*. Therefore those two witnesses must be taken to say this. Mr. Rankine is asked this question: "Suppose you had been asked by pur-

suer whether it would be advisable for him to sell the whole of these minerals to defenders for £100, the defenders paying compensation for the damage to the houses, would you have advised him to take it?" And his reply is: "The advice I have invariably given—I have done it in two instances within the last two years—is, 'Don't let your coal for a less lordship than that obtained by the adjoining proprietor;' and in that case I should have said to the pursuer, 'Do not *take less than £171 7s. 6d. for the coal, plus the dam- [33 age to the houses.'" He says that the advice which he would have given to his client would have been not to sell for less than (which implies, of course, to sell for) £171 7s. 6d., plus the damage done to the surface; that is to say, that if there had come to him some person who, from possession of the adjoining property, had been able to work this coal, and had asked the appellant to sell the coal to him, the appellant would have been advised to reply, "I will sell you the coal for a royalty, that is to say, a sum per ton which will produce to me £171 7s. 6d.; but in addition, you must undertake to pay me whatever damage is done to my houses which are upon the surface of the land;" and, for the purpose of the present argument the amount of damage as ascertained and not objected to is a sum of £200.

Upon that evidence the Court of Session say, "We are of opinion that the value to this appellant of this coal was the money that would have been produced if he had sold the coal, and the money that he would have got if he had sold the coal would have been £171 7s. 6d.; but that would have been accompanied and guarded by a further payment which would have indemnified him for the damage done to the houses upon the surface in getting the coal, and that further sum he must have, in addition to the £171 7s. 6d."

My Lords, I own that under the very peculiar circumstances of this case, there being only the element to consider to which I have referred, namely, the element of value to the appellant, I think he has received in the judgment of the Court of Session that which is the proper value, and I see no reason for differing from the judgment of the learned judges. I therefore advise your Lordships, and move your Lordships, that the appeal be dismissed with costs.

LORD HATHERLEY: My Lords, after carefully considering the case I have come to the same conclusion, though at one time I was under the impression that there was more in the question of the sale by royalty being as it were enforced than I at present think.

The case is certainly a very peculiar case, and, without

34] withdrawing *from any of the principles which I found in the case of *Jegon v. Vivian* ⁽¹⁾ to be established by the prior authorities, I think this case may be disposed of, and will be disposed of, by your Lordships in entire consistency with those principles. There is no doubt that if a man furtively and in bad faith robs his neighbor of property, and, because it is underground, is probably not for some time detected, the Court of Equity in this country will struggle, or I would rather say will assert its authority, to punish fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done as would have been justly made to him if the parties had been working by agreement, or if, as in the present case, they had been the one working and the other permitting the working through a mistake.

The courts have already made a wide distinction between that which is done by the common error of both parties, and that which is done by fraud. In the present case, it is clear on both sides that each party was ignorant of the rights of the pursuer, and consequently the matter is not to be treated as a case of forced sale, but as a case of sale which has taken place by inadvertence; and what we, as a Court of Justice, have to do is to see that under these untoward circumstances that which never ought to have been done at all, but which has been done either through want of watchfulness or through want of knowledge, as the case may be, and which has occasioned in the doing an injury to either of the parties, is remedied and set right, so far as it can be, upon equitable principles. Those principles are no doubt settled by the authorities, many of which have been cited in the course of this argument; those principles are that the owner shall be re-posessed as far as possible of that which was his property, and that, in respect of that which has been destroyed, or removed, or sold, or disposed of, and which cannot therefore be restored in specie, there shall be such compensation made to him as will in fairness between both parties give to the one party the whole of that which was his, or the whole value of that which was his, and will at the same time give to the other, in calculating that value, just allowances for all those outlays which he would have been obliged to make 35] if he had been entering into a contract for that *being done which has, by misfortune and inadvertence on both sides, and through no fault, been done. Perhaps the law may have even gone a step further than in some cases might

⁽¹⁾ Law Rep., 6 Ch., 742.

be necessary. Each case must stand upon its own particular foundation in that respect; but, regard being had to the rule *vigilantibus non dormientibus*, it requires to be carefully considered in each particular case how far the principle is just which deals with property under such circumstances as property which has been acquired by one person from another without payment, and by inadvertence. But when we once arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie.

In this case we are singularly free from any difficulty upon the point, and the parties seem to have carried on the litigation on a principle which does them credit, and on which one wishes to see all litigation carried on. They say, "The misfortune has taken place: we neither of us knew anything about this at the time, and now that it has taken place let us see what can best be done to remedy the misfortune which has so occurred." We find the position of the case to be a very singular one indeed, and one which is not likely to recur in many instances, though it may in some instances—it is this. A small piece of ground, an acre and half in extent, being the property of the pursuer, is surrounded by the property of the defenders; and the defenders thought (and the pursuer thought so too) that it was included in their property, instead of being a separate portion surrounded by their property. That being the case, one thing was perfectly clear (and I shall make it clearer presently by reading the pursuer's own evidence), that nothing could be made by the pursuer of this acre and a half of ground by working it himself. He would not sink a shaft or put up a steam-engine, or use any of the ordinary modes of working a mine, in respect of this acre and a half of ground; and indeed, that is what he tells us himself, because, in words which were read by the learned counsel who last addressed your Lordships, the pursuer says, in his own appendix of proofs, on re-cross-examination: * "If the [36 defenders had not taken away this coal, I might have arranged with them to take it away through their pit, but I don't think it would have been profitable to have done so; I would rather have it standing. I don't think there was any way in which I could have turned this coal into money;" and then he goes to another subject. Several houses were

built upon this property; they were apparently small cottages, not of a very heavy description in themselves, and he complains that if he were minded (though it does not appear that he ever was so minded) to build a manufactory or some large building upon the ground, he would not, in consequence of its being so worked by the defenders, be in a position to find a foundation for his building. Whether he refers to that when he says that he would rather have it remain as it was I do not know, because in his evidence he touches upon it very lightly; but he says that he could not work it himself, and that there were no people to whom he could dispose of it but the defenders themselves.

My Lords, that being so I do not know what better mode there could have been for ascertaining what the value of the property in this case was, than by doing what the pursuer himself says he should have been obliged to do in order to turn it into money, and what his own agent, Mr. Rankine, said he always advised him to do. Mr. Rankine, his agent, said: "It is not workable by yourself in consequence of its small size, and of its so being surrounded by other property—so make the best you can of it, only do not let yourself be driven into a corner. You may perhaps find yourself put to a disadvantage by having only one purchaser; nevertheless, do not part with it for a less royalty than you could get from anybody else, and whatever others are willing to pay I should stand upon, and if you cannot get that I should insist upon retaining the property in its present shape." That being so, the pursuer says in his evidence, "I don't think that there was any way in which I could have turned this coal into money. It was about the middle of 1875, when the houses began to crack, that I first knew the defenders were in the course of working out coal under my feu. I spoke about the matter to Mr. John Motherwell. I did not ask that the working should be stopped. I suggested that it should have been wrought stoop-and-room for 37] the sake of *protecting the property as much as possible. I made no objection to their going on with the working out of the coal below the fue; I was quite content that they should go on with the working." That was before he knew that the coal under the property was his own. Up to that time he could not of course know very well what rights he had to stop this working; but when you put the two sentences together,—one, that he could not have disposed of the property to any other persons, and the other, that he did not think of taking any steps to stop the working, I think he cannot complain that he has got from the gentle-

men the very same terms that he would have got from the adjoining proprietors with whom he has to deal.

The learned judges in the court below seem to have proceeded upon that footing. The Lord President says, "In addition to the consideration above mentioned, it must be kept in view that the coal in question was surrounded on all sides by the coal field of the superior, which is leased to the defenders. As the pursuer's estate is only one and a half acres in extent it is evident that the coal under it could not have been worked to profit by himself working independently. Nobody but the superior or his lessees could have worked the coal to any profit. Now, let us consider the position of the pursuer before the defenders commenced to work his coal. He was then in possession of a certain piece of coal, and his object must be assumed to be to make the most of it. It cannot be assumed that he could contemplate keeping the coal as a support for his cottages, instead of working it out. It was situated in a part of the country where every available bit of mineral is in use to be wrought. Now, at that point of time, had the parties come together the coal would in all probability have been disposed of to the defenders on terms mutually advantageous. The pursuer says indeed, that he could have made exceptionally good terms for himself, as his coal stood in the way of the defenders' working. But I think when Mr. Smith spoke of the defenders' necessity being the pursuer's opportunity he went too far. I do not think that the purchase of the pursuer's coal was a matter of necessity to the defenders, but only a matter of convenience. There was nothing to prevent their working round his coal. But, on the other hand, if the pursuer wished to *make the most of his coal he [38 must have taken what the defenders would give him, or let it stand." In that state of things, and finding that the coal has so been worked out, the learned judges say, "We find that the best mode, in this particular case, of ascertaining the proper measure of damages is to give the pursuer what the books and cases tell us we are to give him, that is to say: As far as possible, the value of his coal, and that we will do by saying that he shall be compensated to the same extent as others have been compensated in adjoining properties; besides that he shall be compensated, and he has been by the decree compensated, for any damage done to the buildings upon the surface." That has been estimated at £200, and acquiesced in by both parties. He is paid for the royalty £171; he is paid for the value of the coal which has

been disposed of; and therefore it seems to me that all he can possibly ask for has been given.

The question of way-leave does not seem to have been argued in the court below, but if it had been argued I should have been prepared to say that I acquiesce in this particular case, and under all the circumstances of this case—which I think are extremely different in many remarkable particulars from those of *Jegon v. Vivian* (¹)—in the interlocutor pronounced by the Lord Ordinary. But, looking at the form in which this case has been brought before us, no question of this kind arises. Nothing could have been properly estimated and given as the value of the right exercised by the defenders of taking their wagons and coals from time to time through the ground of the pursuer, they assuming it to be their own ground. What profit can be said to have been derived from that? The profit is this: that you save distance; you save other payments which you might have had to make, and therefore, inasmuch as the pursuer cannot make out that the slightest damage has accrued to him in respect of that user, what you have to pay to him is only the value of his coal plus the damages to the surface. It appears to me to be quite consistent, and that the pursuer rightly has not pressed that case of the way-leave, because he would have done so with very little effect.

Therefore, under all these circumstances, I am prepared to acquiesce entirely in the judgment of the court below.

39] *LORD BLACKBURN: I also think that the judgment of the court below should be affirmed, and that consequently the appeal should be dismissed with costs.

The point may be reduced to a small compass when you come to look at it. I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. That must be qualified by a great many things which may arise—such, for instance, as by the consideration whether the damage has been maliciously done, or whether it has been done with full knowledge that the person doing it was doing wrong. There could be no doubt that there you would say that everything would be

(¹) Law Rep., 6 Ch., 742.

taken into view that would go most against the wilful wrongdoer—many things which you would properly allow in favor of an innocent mistaken trespasser would be disallowed as against a wilful and intentional trespasser on the ground that he must not qualify his own wrong, and various things of that sort. But in such a case as the present, where it is agreed that the defenders, without any fault whatever on their part, have innocently, and, being ignorant, with as little negligence or carelessness as possible, taken this coal, believing it to be their own, when in fact it belonged to the pursuer, then comes the question,—how are we to get at the sum of money which will compensate them?

Now, my Lords, there was a technical rule in the English courts in these matters. When something that was part of the realty (we are talking of coal in this particular case) is severed from the realty and converted into a chattel, then instantly on its becoming a chattel, it becomes the property of the person who had been the owner of the fee in the land whilst it remained a portion of the land; and then in estimating the damages against a person who had carried away that chattel, it was considered and decided that the owners of the fee was to be paid the value of the chattel at the [40 time when it was converted, and it would in fact have been improper, as qualifying his own wrong, to allow the wrongdoer anything for that mischief which he had done, or for that expense which he had incurred in converting the piece of rock into a chattel, which he had no business to do.

Such was the rule of the common law. Whether or not that was a judicious rule at any time I do not take upon myself to say; but a long while ago (and when I say a long while I mean twenty-five years ago) Mr. Baron Parke put this qualification on it, as far as I am aware for the first time. He said, If however the wrongdoer has taken it perfectly innocently and ignorantly, without any negligence and so forth, and if the jury, in estimating the damages, are convinced of that, then you should consider the mischief that has been really done to the plaintiff who lost it whilst it was part of the rock, and therefore you should not consider its value when it had been turned into a piece of coal after it had been severed from the rock, but you should treat it at what would have been a fair price if the wrongdoer had bought it whilst it was yet a portion of the land as you would buy a coal field⁽¹⁾. That was the rule to be applied where it was an innocent person that did the wrong; that rule was followed in the case of *Jegon v. Vivian*⁽²⁾, which

(1) *Wood v. Morewood*, 3 Q. B., n. 440.

(2) *Law Rep.*, 6 Ch., 742.

has been so much mentioned; it was followed in the Court of Chancery, and, so far as I know, it has never been questioned since, that where there is an innocent wrongdoer the point that is to be made out for the damages is, as was expressed in the minutes of the decree:—"The defendants to be charged with the fair value of such coal and other minerals at the same rate as if the mines had been purchased by the defendants at the fair market value of the district;" that I understand to mean as if the mines had been purchased while the minerals were yet part of the soil. That, I apprehend, is what is to be done here, and that is what both the Lord Ordinary and the First Division of the Court of Session have endeavored to do. They have come to different pecuniary results, and the question really comes to be which is correct.

Upon that the Lord Ordinary, as I understand, has gone upon this position. He said, "I have taken evidence, and 41] the result of *that is, that it is agreed on all hands that this coal, when it was brought to the surface, actually did sell for £1,768 5s. 10d. I look at the evidence, and I take the evidence to be that the actual amount expended by the defendants (there is contradictory evidence on such points as might have been expected, and it is not all very clear), was 4s. 3d. per ton"—and, deducting that from the £1,768 5s. 10d., he makes it £515 12s. 1d., which is what he says is the sum that the pursuer ought to recover taking off all the expenses that the defenders have incurred. But then, as it would necessarily follow, when you took away the coals that were below the land, that the surface of the land would come down, you must not take the sum which would be given as compensation for the injury to the surface twice over. You must not take that sum as being a matter which you are to be paid for, and also take the coals as if they had been got out without damage. On the Lord Ordinary's figures, as it seems to me, the £515 12s. 1d. would be right, and if there was no other way of getting at the figures, if you could not get evidence of the value of the coal *in situ* in a more correct way, I suppose it would be right to take them in that way. It is always a difficult thing to ascertain the actual expenses, and you may go wrong, but you must come as near to it as you can.

But then the Lord Ordinary himself observes that, taking that way of getting it, and giving the pursuer £515 12s. 1d., "The truth of the matter is, that the removal of the pursuer's coal by the defenders, in place of being a misfortune, has been to the pursuer a singular stroke of luck. The size

of his feu is less than an acre and a half, and the coal which it contained could not have been wrought to profit by itself. The expense of sinking a pit and providing machinery would many times over have exceeded the value of the minerals. Possibly, no doubt, the pursuer might have endeavored to make with the defenders terms upon which his coal might have been raised along with the coal of which they were the tenants. But the return which would have been rendered to him under such an arrangement must have fallen far short of what has been awarded by the Lord Ordinary. The lordship, in the circumstances, could not be expected to be higher than that paid by the defenders for the adjoining portions of the seam; *and this upon the quantity [42 taken out, even if increased by reasonable damages for injury through subsidence to the houses on the surface, would certainly have fallen considerably short of £500." Now, when you find that the Lord Ordinary himself, who is professing to ascertain what is the money value of the damage that the pursuer has received, says: "I have got at it in this particular way, but that money value is very considerably above the damage that you have received: it has been a singular stroke of good luck to you that you should get it," it occurs to one at once, *prima facie*, that there must have been something wrong in the way in which that money value was got at, and I think that there was an error in it, and that error was that the Lord Ordinary thought he was bound by decisions (which I do not think he was) to take that mode, and that mode only, of getting at the value of the coal *in situ*, namely, the price which the coal fetched when it was sold, deducting from that the cost of hewing and drawing and so forth, and so to ignore totally the fact that this was an isolated small patch of land from which the pursuer, as he himself admits, could not possibly have got coal by any practical means whatever, except by bargaining with the defenders. I think there the Lord Ordinary was under a mistake. The Lord President points out very clearly to my mind that the pursuer could not have made any use of his coal at all as long as he did not let it to the defenders, who were the only people who could take it. He cannot do more than ask for his damage to the surface. That he is of course entitled to, as the defenders have taken his coal without his leave and against his will. If they had taken it with full knowledge *scienter* there would have been very much more damage given; but they have innocently and ignorantly taken away his coal. "And then" (says the Lord Ordinary), "we must see what was the value of the

coal *in situ* as it stood there to the pursuer at the time when the defenders by mistake took it away, and for that we must give compensation." Then he takes the evidence of Mr. Rankine, and says, "That is the best evidence that we could have of the value of the coal," and that sum is what the Court of Session has given.

My Lords, I only wish to say one word to guard against any misapprehension on a point which I at first a little mis-43] apprehended. *I do not think that this decision of the Court of Session is that the royalty is the measure of the damages. It is only that it is evidence of the value which is the measure of the damages. As to the other matters, about the way-leave and so forth, I quite agree with what has been said by my noble and learned friend on the wool-sack, that inasmuch as in the Court of Session on appeal from the Lord Ordinary those questions were not raised again they are not before this House at all. If they were, I should be inclined to agree with what has been said by my noble and learned friend opposite (¹), and the pursuer would gain very little benefit from that contention.

Interlocutor appealed against affirmed; and appeal dismissed with costs.

Lords' Journals, Feb. 13, 1880.

Agent for appellant: *Andrew Beveridge.*

Agents for respondents: *Simson & Wakeford.*

(¹) Lord Hatherley, see p. 38.

See Moak's Underhill, 583-7.

See also Mr. Freeman's elaborate note, upon the law of confusion, to the case of *Baker v. Wheeler*, 8 Wend., 505, in 24 Am. Dec. 73-88.

Where one wrongfully mixes the property of another with his own, so that which belongs to such other cannot be separated, the latter is entitled to the whole mass.

Nova Scotia: *Lane v. McDonald*, 3 Nova Scotia L. R., 37.

A party may maintain an action for a chattel which has become such by a wrongful severance from the realty; and the fact that the owner of the realty has contracted to sell it, and the severance of the trees was by the vendee, and that vendee held possession as licensee, licensed to cut and remove standing timber on certain conditions, does not defeat the right of action by the vendor. A vendee in possession of land under a contract of purchase,

after default in payment, is a tenant at will after. So where a party obtained possession of land under a contract of purchase, with the license to cut timber on each forty acres as often as he paid a stipulated proportion of the purchase price, and he made default in the payment of an instalment, the cutting of timber would be a wrongful conversion, and he could not give a purchaser thereof lawful possession of the timber: *Nelson v. Graff*, 12 Fed. Repr., 389.

A bill which prays the appointment of a receiver, on the ground that the defendant had so mixed complainant's goods with his own that it would be extremely difficult to separate them, should charge that the alleged confusion was fraudulent or wrongful in order to justify the interposition of the court: *Morrison v. Shuster*, 1 Mackey (D. C.), 190.

If a person adds to goods acquired

under a fraudulent sale, in which he participated, other goods subsequently purchased, he is not entitled, in an action against an officer, who attaches all the goods as the property of the fraudulent vendor of the first named goods, to recover the value of the goods subsequently purchased, if the mingling them with the other goods was purposely done, or through want of proper care: *Stearns v. Herrick*, 132 Mass., 114.

If the purchaser of goods from an insolvent debtor intentionally intermingles them with his own goods, and refuses to furnish the sheriff seeking to levy an execution on them, as the property of the vendor, the information necessary to distinguish them, he cannot claim any advantage from the confusion of goods; and having interposed a claim, under the statute, to the goods levied on, the duty is cast on him to furnish the proof necessary to separate the goods: *Duer v. Kelly*, 1 Amer. Ins. Rep., 431, 68 Ala., 192.

Where the wife mingles funds conveyed to her by her husband, in fraud of his creditors, with her own, there can be no separation of the property where she is a party to the fraud and ratifies the conveyance: *Alt v. Lafayette Bank*, 9 Mo. App., 91; *Franklin v. Gumersell*, Id., 84.

Where one innocently mingles his own with goods of an execution debtor, believing all to be his own, he is entitled to recover the value of his goods, if taken under execution against the debtor: *Franklin v. Gumersell*, 9 Mo. App., 84.

Where an agent commingled the money of his principal with his own, without the knowledge of the principal, and with the commingled money purchased hides, in the execution of his agency, so far as the creditors of the agent are concerned, they belonged to the principal; but if the agent, without the knowledge or fault of the principal, commingles his own property with that of his principal, so that the same is incapable of separation, he and the principal become tenants in common of such property as to the agent's attaching creditors: *Safford v. Gulid*, 58 Verm., 202.

Where one wrongfully converts the property of another into a different article or class of articles, the title re-

mains in the original owner, and he is entitled to the value as thus increased. A wrongdoer is not entitled to be allowed for an increase of the property in consequence of his wrongful acts.

Kentucky: *Strubber v. Trustees*, etc., 78 Ky., 481.

United States, Circuit and District: *Nelson v. Graff*, 12 Fed. Repr., 389.

United States: *Woodenware Co. v. U. S.*, 106 U. S., 432.

The just and reasonable use of the water which belongs to the riparian proprietor, in case of its being congealed into ice, would give him the unlimited use and appropriation of the ice as his exclusive property, of which he cannot be deprived by a mere wrongdoer. The ice may be regarded as attached to the soil, and, like any other accession, may be considered as a part of the realty, and any stranger who enters upon the same, and appropriates the ice to his own use, will be liable to the owner in trespass *quare clausum fregit*.

Where a person takes the ice in a stream over the land of another, to which the owner of the land has the exclusive right, the measure of damages in trespass for such wrongful taking is the value of the ice as soon as it is made a chattel, that is, when scraped, plowed, sawed, cut and severed, ready for removal. The rule is analogous to cases where coal is wrongfully taken from the soil of another: *Washington Ice Co. v. Shortall*, 101 Ill., 46.

Where the value of property is increased in good faith, the owner can only recover the original value; as where trees are cut down and converted into cordwood, the measure of damages is the difference between the value of the land with the timber standing and with the timber removed, or it is the amount of injury caused by defendant's going on the land and removing the timber as a continuous act.

Canada, Lower: *Hall v. Hould*, 7 Quebec L. R., 81.

Iowa: *Striegel v. Moore*, 55 Iowa, 88.

Michigan: *Thompson v. Moiles*, 46 Mich., 42.

Mississippi: *Evans v. Miller*, 58 Miss., 120.

United States: *Woodenware Co. v. U. S.*, 106 U. S., 433.

1880

Livingstone v. Rawyards Coal Company.

H.L. (S.)

E. forbade M. to cut any trees on his land, and pointed out to M. what he supposed to be the boundary line between their lands. M. proceeded to cut timber within the boundary of his own land as indicated by E. But after the timber had been cut and used by M. the lands were surveyed, and it was ascertained that the trees had been felled on E.'s land. E. then sued for the value of his trees, and the circuit court instructed the jury, in effect, that he could not recover, because he had consented to the cutting of his trees. Held, that E. did not, in law, consent to the cutting; that his mistake as to the boundary did not deprive him of his right to compensation for his trees; but that he could only recover their actual value, to be ascertained upon the basis most favorable to M., who took them through a mistake, as to which he was partly led by E.; also that E. could waive the tort for the wrongful taking and recover in assumption: *Evans v. Miller*, 58 Miss., 120.

In an action for the conversion of chattels, against an innocent purchaser, from a person who had previously converted the property to his own use and had afterward added to its value by his own labor, the measure of the damages is the value of the chattels when first taken from the owner, whether the first taker was a wilful or an involuntary trespasser: *R. R. Co. v. Hutchins*, 37 Ohio St. R., 282, approving *Lake Shore, etc., v. Hutchings*, 32 id., 571; *Woodenware Co. v. U. S.*, 106 U. S. R., 432.

An innocent mortgagee will not be compelled to suffer by reason of the wrongful confusion of the goods by the mortgagor: *Merchants, etc., v. McLaughlin*, 1 McCrary, 258.

A. contracted to deliver to B. 224,000 rail road ties on the St. Paul & Pacific and the Northern Pacific, the line of two railroads; B. in fact so delivered 20,000 in excess of that number; B. gave A. an order on B.'s agent, stating that A. had delivered such excess, and requesting the agent to return him that number. Held, that it was proper for defendants, upon showing that they left ties on the Northern Pacific line, to show how many, and what became of them—as that they were burned; also that the railroad company had paid defendant's estimates, including

all the ties delivered, is immaterial; also that after the settlement, and until the 20,000 ties called for by the order given to plaintiff should be separated from the others, he had not the title to any specific ties; also that the defendants had a right to take out of all those delivered, 224,000 as their portion of the ties, if they left for plaintiff enough to meet the order given him; also that they were not bound to leave for him that number of ties of those on the line of the Northern Pacific road; and it not appearing that they carried away any of those on the line of the St. Paul & Pacific (of which there were many more than enough to satisfy the order given to the plaintiff), it does not appear that they have done what they had not a right to do: *Chandler v. DeGraff*, 27 Minn., 208.

The mere act by a trustee of mingling trust money with his own money, by depositing the different moneys in a bank in his individual name, with nothing done by the banker to distinguish the trust money from the individual money, does not necessarily prevent an identification of the trust fund. Equity will undertake to disentangle the accounts, and give to the *cestui que trust* the portion that belongs to him.

If a trustee commingles trust money with money of his own, and afterwards separates from the common fund a proper portion of it as the property of the *cestui que trust*, and, with such portion of the fund, purchases real estate in his own name, the trust becomes impressed upon and attaches to the money thus set aside and the real estate purchased with such money.

A trustee need not purchase property with the very dollars received from the trust fund, nor give any notice to the *cestui que trust* of the purchase, nor make any delivery to him, in order to create a trust estate. If he uses or loses the trust fund, he may afterwards, by some proceeding or act of his own, substitute his own money therefor, and the substituted money will be subject to the same trust that was imposed upon the money by the trustee used or lost: *Houghton v. Davenport*, 74 Maine, 590.

The owner of a negotiable promissory note, indorsed in blank by the payee, handed it to an attorney at law

for collection. The attorney deposited it in a bank for collection, without stating for whose account. The bank collected it, credited the attorney with it, and applied the amount standing to his credit in part payment of the debt of the attorney to the bank. The attorney was subsequently adjudged a bankrupt, and the bank made a settlement with his assignees, in which the amount of the note was included. The owner of the note, a year after the settlement,—but as soon as he knew that the bank had collected the note,—made a demand upon the bank for the proceeds of the note. Held, that he could not maintain an action against the bank therefor: *Wood v. Boylston, etc.*, 129 Mass., 358.

The U. S. Statutes of March 1, 1847, § 2, which provides that "moneys taken from the mails" by theft or robbery, which comes into the possession of any of the agents of the post office department, shall be paid to the order of the Postmaster-General for the benefit of the rightful owner, applies to the proceeds of such moneys; and this court will not entertain a bill in equity brought by a person who had stolen money from the mail, against a postmaster, to enforce a trust deed executed by the thief, by which he conveyed to the defendant the proceeds of such moneys in trust to pay claims arising out of the theft, and to return the balance to the plaintiff: *Laws v. Burt*, 129 Mass., 202.

The court below instructed the jury that it was the duty of a surviving member of the firm to convert its property into money, collect debts due to it, and first apply them to the payment of its debts due, and that if he mingled the goods of the firm with his own so that they could not be identified, he rendered his own liable for the firm debts; and that the application of the proceeds of the goods to the payment of his individual debts was a fraud upon the firm creditors. Held, that the instruction was erroneous: *McGinty v. Flannagan*, 106 U. S. R., 661.

An owner of pine lands, in contracting the pine to a shingle manufacturer, retained the title thereto until it should be fully paid for, and also reserved the right to seize the shingles manufactured from it if the manufacturer failed to perform the conditions of his contract. The manufacturer mingled these shingles with others, and, with the knowledge of his vender's agent, treated them all as his own property and sold them to *bona fide* purchasers. There was evidence tending to show that in buying, the latter relied on this apparently exclusive ownership. Held, that they could maintain trover against the owner of the pine, if he seized any shingles sold to them which had not been manufactured from his own timber: *Foster v. Warner*, 49 Michigan, 641.

[5 Appeal Cases, 68.]

J.C., Nov. 12, 18, 1879.

[PRIVY COUNCIL.]

***ANGUS ROBERTSON and Others, Plaintiffs; and** [63
GEORGE DAY, Defendant.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Lands Act Amendment Act, 1875, s. 81—Construction.

The proviso to sect. 81 of the Lands Act Amendment Act, 1875 (which regulates the application by a Crown lessee to purchase lands comprised within his lease), enacts:

"Provided also that no such application to purchase as aforesaid shall be made for more than one square mile within each block of five miles square out of each lease, or a proportionate quantity out of any holding of less area":

1879

Bell v. Corporation of Quebec.

J.C.

Held, that according to the true construction thereof, a Crown leasee has a right of pre-emption of such square mile if it forms part of a block which is equivalent to an area of five miles square, i.e., which contains an area of twenty-five square miles, irrespective of whether such block forms or contains a geometrical figure five miles square.

[5 Appeal Cases, 84.]

J.C.*, July 15, 16, 17; Nov. 22, 1879.

[PRIVY COUNCIL.]

84] *DAVID BELL, *Plaintiff*; and THE CORPORATION OF QUEBEC, *Defendant*.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA.

French Law in Quebec—Riparian Proprietors—Droit d'accès et de sortie—Navigable Rivers—Obstruction to Navigation—Damage.

In an action for damages and to obtain the demolition of a bridge constructed by the Corporation of Quebec across the Little River St. Charles, on the ground that the bridge obstructed the navigation of the river and thereby caused damage to the plaintiff as the owner of riparian land; it appeared that another bridge existed a short distance higher up the river, that the river was tidal beyond the higher bridge, and navigable for boats, flats, and rafts, and that it was possible at exceptionally high tides to float barges as far as the higher bridge, but that the difficulties and risks which from natural causes attended the navigation of craft of this description were so great that the river in its present state did not admit of their use in a practicable and profitable manner; that the small boats, flats, and rafts, could be navigated as before, unobstructed by the bridge, although masted barges could not pass it without lowering their masts; that the plaintiff's land was situated between the two bridges and was used as a farm, but was not proved to have been depreciated in value by reason of the bridge complained of, and that the plaintiff was not proved to have sustained damage from actual interruption of traffic.

Held, that although there may be "*droit d'accès et de sortie*," belonging, according to French law as it prevails in Quebec, to riparian land as to a house in a street which, if interfered with, would at once give the proprietor a right of action; yet this right is confined to what it is expressed to be, "*accès*," or the power of getting from the water-way to and upon the land (and the converse) in a free and uninterrupted manner; that such right had not on the evidence been violated; and that supposing the bridge complained of to cause some obstruction to the navigation, the action could not be maintained in respect of it without proof of actual and special damage.

Lyon v. Fishmongers' Company (1) considered.

Whether an obstruction amounts to an interference with a riparian proprietor's [85] *access to his frontage, which is a private right by English as by French law, is a question of fact to be determined by the circumstances of each particular case.

According to French law the test of the navigability of a river is its possible use for transport in some practical and profitable manner.

* *Present*.—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 1 App. Cas., 662; 17 Eng. R., 51.

[5 Appeal Cases, 102.]

J.C., Nov. 11, 12; Dec. 13, 1879.

[PRIVY COUNCIL.]

*SIR ANTHONY MUSGRAVE, *Defendant*; and JOSÉ [102
IGNACIO PULIDO, *Plaintiff*.

ON APPEAL FROM THE SUPREME COURT AT JAMAICA.

Acts of State—Authority of Governor—Jurisdiction—Privilege—Pleading.

Trespass for seizing and detaining at Kingston in Jamaica a schooner of which the plaintiff was charterer, and which had, as alleged, put into the port of Kingston in distress and for repairs.

Plea in substance of privilege and to the jurisdiction, that the defendant was Captain-General and Governor-in-Chief of the Island of Jamaica, that the acts complained of were done by him as governor of the island and in the exercise of his reasonable discretion as such, and as acts of State.

The plea did not aver even generally that the seizure of the plaintiff's ship was an act which the defendant was empowered to do as governor, nor even that it was an act of State:

Held, that the judgment *respondent ouster* was right and must be affirmed.

The governor of a colony (in ordinary cases) cannot be regarded as a viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission and limited to the powers thereby expressly or impliedly intrusted to him. It is within the province of municipal courts to determine whether an act of power done by a governor is within the limits of his authority and therefore an act of State.

Quære, how far a governor when acting within the limits of his authority, but mistakenly, is protected.

APPEAL from a judgment of the Supreme Court (July 6, 1878) allowing the respondent's demurrer to the appellant's plea.

The respondent, by his declaration in the action, dated the 22d day of November, 1877, claimed from the appellant the sum of £14,000 damages in trespass for the unlawful detention by the appellant of a certain ship called the *Florance* and her cargo, in the port of Kingston, in the Island of Jamaica, of which ship the respondent was the charterer; the said ship, whilst on a voyage *from Colon to the [103 Island of St. Thomas, having been compelled to put in to the said Port of Kingston for repairs.

On the 17th of December, 1877, the appellant, by his attorney, filed certain pleas, the only plea material to this appeal being as follows:—"The defendant, Sir Anthony Musgrave, by Samuel Constantine Burke, his attorney, comes and says that he ought not to be compelled to an-

**Present*:—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR HENRY S. KEATING.

swer in this action because, he saith, that at the time of the grievances alleged in the said declaration, and at the time of the commencement of this action, he was, and still is, Captain-General and Governor-in-Chief of the Island of Jamaica and its dependencies, and was, and still is, as such entitled to the privileges and exemptions appertaining to such office and to the holder thereof, and that the acts complained of in the said declaration were done by him as governor of the said Island of Jamaica, and in the exercise of his reasonable discretion as such, and as acts of State, and this the defendant is ready to verify, wherefore he prays judgment if he ought to be compelled to answer in this action."

On the 4th of June, 1878, it was ordered by consent of counsel that all pleas of the appellant, except the plea of privilege by attorney, should be struck out, together with replications and entry of judgment of *non pros.*, with liberty to the respondent to demur.

On the 10th day of June, 1878, the respondent duly filed his demurrer to the appellant's plea, alleging the following grounds of demurrer:

1. That the plea did not disclose any privilege exempting the defendant, Sir Anthony Musgrave, from answering this action.

2. That the plea gave no better writ.

On the 10th day of June, 1878, the appellant's joinder in demurrer was filed, and judgment was delivered (Smith, C.J., and Ker, J.) whereby it was ordered:—That judgment be entered for the plaintiff on the said demurrer, and the defendant, Sir Anthony Musgrave, do answer further to the said writ and declaration of the plaintiff; and the said defendant is given until the 30th of July instant to plead in chief to the said declaration; and it is further ordered that the defendants do pay the plaintiff's costs.

104] **The Attorney-General* (Sir J. Holker), and Mr. A. L. Smith, for the appellant, contended that the plea was good in substance as well as a plea of privilege. As to the form of the plea reference was made to Jamaica Act, 28 Vict. c. 37. This is a plea in bar and not in abatement. [SIR MONTAGUE E. SMITH: It is treated in your favor as a plea in abatement. Otherwise if the demurrer had been allowed it would have concluded you unless you had obtained leave to amend.] Reference was made to *Reg. v. Cooke* (') and *Digby v. Alexander* ('), and to the plea in *Mostyn v. Fabrigas* ('). Although some of the decisions show that a governor may be sued under certain circum-

(') 2 B. & C., 871.

(*) 8 Bing., 416.

(*) Cowp., 170.

stances, yet the appellant as governor of Jamaica is not liable to be sued in the courts of the island in an action of trespass or for acts done by him as acts of State. The effect of the demurrer is to admit that the acts complained of were done by the appellant in his reasonable discretion as governor of the island and as acts of State: *Tandy v. Earl of Westmoreland* (*); *Luby v. Lord Wodehouse* (*). See also the cases collected in Forsyth's Constitutional Law (1869), p. 86; *Nabob of the Carnatic v. East India Company* (*); *Buron v. Denman* (*); *Secretary of State for India in Council v. Kamachee Sahiba* (*); *Cameron v. Kyle* (*); *Phillips v. Eyre* (*).

Mr. Herschell, Q.C., and Mr. Gainsford Bruce, for the respondent, contended that the appellant did not set up his plea as a plea in bar. He thereby claimed and intended to claim his privilege as governor, and did not rely upon it as a defence to the action, but as precluding the necessity of defending himself at all. The plea shows no sufficient grounds why the writ should be stayed without requiring the appellant to answer over on the merits; it cannot be taken as a plea to the jurisdiction, being pleaded by attorney and not in person; it gives no better writ and therefore is bad. If the act complained of had been shown to be an act of State, it would have been a defence as well in the courts *of the island as of the United Kingdom; but it is [105 not everything which a man does *quâ* governor which is an act of State. A private individual may set up that what he did was an act of State, provided he was armed with the necessary authority. If he exceeds the authority, it is not an act of State, unless subsequently ratified: *Buron v. Denman* (*). There is no personal privilege appertaining to the office of governor of Jamaica which exempts him from being sued in the courts of the island; and the allegation in the plea that the acts in question were done by the appellant as governor, and in the exercise of his reasonable discretion as such, and as acts of State, is no ground for staying the writ and exempting the defendant from answering. In the two Irish cases cited on the other side the courts took judicial notice that the acts were acts of the governor acting as such. [SIR MONTAGUE E. SMITH: To test whether this is a good plea, see what the appellant would have to prove, and whether if proved it would be an answer.] He would have

(*) 27 How. St. Tr., 1246, 1264.

(*) 17 Ir. Com. Law Rep., 618.

(*) 1 Ves. Jun., 371; S. C., 2 Ves. Jun., 56.

(*) 2 Ex., 167.

(*) 13 Moore's P. C., 22.

(*) 3 Knapp's P. C., 332.

(*) Law Rep., 4 Q. B., 225; 38 L. J. (Q.B.), 113.

(*) 2 Ex., 167.

to prove that what he did was an act of State, show what he did, how he did it, and in what character. [SIR JAMES W. COLVILLE referred to *Forrester v. Secretary of State* ⁽¹⁾ to show that it is a question of fact whether an act is an act of State.]

Mr. A. L. Smith replied.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH: To an action of trespass brought against the appellant, Sir Anthony Musgrave, in the Supreme Court of Jamaica, for seizing and detaining at Kingston in Jamaica, a schooner called the Florence, of which the plaintiff was charterer, and which had, as alleged, put into the port of Kingston in distress and for repairs, the appellant pleaded the following plea:

"The defendant, Sir Anthony Musgrave, by his attorney, comes and says that he ought not to be compelled to answer in this action, because he saith that at the time of the grievances alleged in the said declaration, and at the time of the 106] commencement of *this action, he was and still is Captain-General and Governor-in-Chief of the Island of Jamaica and its dependencies, and was and still is as such entitled to the privileges and exemptions appertaining to such office and to the holder thereof, and that the acts complained of in the said declaration were done by him as governor of the said Island of Jamaica, and in the exercise of his reasonable discretion as such, and as acts of State; and this the defendant is ready to verify, wherefore he prays judgment if he ought to be compelled to answer in this action."

The plaintiff demurred to this plea, and the present appeal is from the judgment of the Supreme Court allowing the demurrer, and ordering the appellant to answer further to the writ and declaration.

The plea is in form a dilatory plea, and does not profess to contain a defence in bar of the action. It was advisedly pleaded as a plea of privilege, with the object of raising the question of the immunity of the appellant as governor from being impleaded and compelled to answer in the courts of the colony. That this was so is plain not only from the form of the plea, but from an arrangement come to between the parties before the argument of the demurrer. In an interlocutory proceeding to set aside a judgment of *non pros.* as irregularly obtained an order was made by consent "that all pleas of the defendant, Sir Anthony Musgrave, except the plea of privilege by attorney, be struck out, together with replications and entry of judgment of *non pros.*, with liberty to the plaintiff to demur, it being arranged that the

(1) Law Rep., Ind. App. Sup. Vol., p. 10.

demurrer be set down for hearing at the present term, and if a judgment *respondeat ouster* the defendant, Sir Anthony, have liberty to plead not guilty by statutes."

The decision of the Supreme Court was accordingly given upon the plea, as a plea of privilege, and altogether upon this aspect of it, the judgment being one of *respondeat ouster*.

Upon the hearing of the present appeal the Attorney-General, on the part of the appellant, whilst not giving up the plea in the shape in which it was pleaded, insisted that if it disclosed a good defence in substance to the action, as he contended it did, its form and the arrangement of the parties might be disregarded, and a general judgment given for the defendant; and, though *under protest from [107 the respondent's counsel, the discussion at their Lordships' bar was allowed to take the wider scope which the Attorney-General's contention introduced into the case.

If the plea is to be regarded as a plea of privilege only, and as claiming immunity to the governor from liability to be sued in the courts of the colony, their Lordships think that it cannot, in that aspect of it, be sustained.

The dictum attributed to Lord Mansfield in *Fabrigas v. Mostyn* (¹), that "the governor of a colony is in the nature of a viceroy, and therefore locally during his government no civil or criminal action will lie against him, the reason is, because upon process he would be subject to imprisonment," was dissented from and declared to be without legal foundation in the judgment of the Lords of the Judicial Committee delivered by Lord Brougham in the case of *Hill v. Bigge* (²). In that appeal their Lordships were of opinion that the plea of the lieutenant governor of the Island of Trinidad to an action brought against him in the civil court of the island, claiming that whilst lieutenant governor he was not liable to be sued in that court, could not be sustained. The action was for a private debt contracted by the defendant in England before he became governor, but the principle affirmed by the judgment is that the governor of a colony, under the commission usually issued by the Crown, cannot claim, as a personal privilege, exemption from being sued in the courts of the colony. The claim to such exemption is thus met:—"If it be said that the governor of a colony is *quasi* sovereign, the answer is, that he does not even represent the sovereign generally, having only the functions delegated to him by the terms of his commission, and being only the

(¹) 1 Cowp., 161.

(²) 3 Moore, P. C., 465.

officer to execute the specific powers with which that commission clothes him."

The defendant has sought to strengthen his claim of privilege by averring in his plea that the acts complained of were done by him "as governor," and as "acts of State." Their Lordships propose hereafter to consider the particular averments of this plea. It is enough here to say that it appears to them that if the governor cannot claim exemption from being sued in the courts of the colony in which he holds [108] that office, as a personal privilege, *simply from his being governor, and is obliged to go further, his plea must then show by proper and sufficient averments that the acts complained of were acts of State policy within the limits of his commission, and were done by him as the servant of the Crown, so as to be, as they are sometimes shortly termed, acts of State. A plea, however, disclosing these facts would raise more than a question of personal exemption from being sued, and would afford an answer to the action, not only in the courts of the colony, but in all courts; and therefore it would seem to be a consequence of the decision in *Hill v. Bigge* (*) that the question of personal privilege cannot practically arise, being merged in the larger one, whether the facts pleaded show that the acts complained of were really such acts of State as are not cognizable by any municipal court.

In the case of *The Nabob of the Carnatic v. The East India Company* Lord Thurlow said, that a plea pleaded in form to the jurisdiction of the court, but which denied the jurisdiction of all courts over the matter, was absurd; and that such a plea, if it meant anything, was a plea in bar (*).

In their Lordships' view, therefore, this plea, if it can be supported, must be sustained on the ground mainly relied upon by the Attorney-General, viz., that it discloses in substance a defence to the action.

Before advertng to the sufficiency of the averments in this plea, it will be convenient to refer to some decisions in which the position of governors of colonies has been considered. In the leading case of *Fabrigas v. Mostyn* (*), the action was brought against Mr. Mostyn, the governor of Minorca, for imprisoning the plaintiff, and removing him by force from that island. The governor's special plea of justification alleged, that he was invested with all the powers, civil and military, belonging to the government of the island, that the plaintiff was guilty of a riot, and was endeavoring to raise a mutiny among the inhabitants, in breach of the

(*) 3 Moore, P. C., 463.

(*) 1 Ves. Jun., 388.

(*) 1 Cowp., 161.

peace, and that, in order to preserve the peace and government of the island, he was forced to banish the plaintiff from it. It then averred that the acts complained of were necessary for this object, and were done without undue violence. Upon the trial the *governor failed to prove [109 this plea, and the plaintiff had a verdict. When the case came before the Court of Queen's Bench, upon a bill of exceptions to the ruling of the judge, Lord Mansfield said his great difficulty had been, after two arguments, to be able clearly to comprehend what the question was that was meant seriously to be argued. It seems, however, that the liability of the governor to be sued was raised, and very fully discussed, one ground of objection being, that he could not be sued in England for an act done in a country beyond the seas, and upon this question Lord Mansfield declared that the action would, to use his own phrase, "most emphatically" lie against the governor. His judgment proceeds to show, in a passage bearing materially on the point now under discussion, in what way a defence to such an action might be made. He says, "If he has acted right according to the authority with which he is invested, he may lay it before the court by way of plea, and the court will exercise their judgment whether it is a sufficient justification or not. In this case, if the justification had been proved, the court might have considered it a sufficient answer; and if the nature of the case would have allowed of it, might have adjudged that the raising a mutiny was a good ground for such a proceeding."

In the case of *Cameron v. Kyte* (1), which came before this board on an appeal from the colony of Berbice, the question was, whether the governor had authority to reduce a commission of 5 per cent. upon all sales in the colony, granted to an officer called the vendue master by the Dutch West India Company before the capitulation of the colony to the British Crown. It was urged that the governor was the King's representative, exercising the general authority of the Crown, and, as such, had power to make the disputed reduction. It was, however, decided that the governor did not hold the position or possess the authority sought to be attributed to him, and that the act in question was beyond his powers. In the judgment of this committee, delivered by Baron Parke, it is said:

"There being, therefore, no express authority from the Crown, the right to make such an order must, if it exist at all, be implied from the nature of the office of governor. If

(1) 3 Knapp, 332.

110] a governor had, by *virtue of that appointment, the whole sovereignty of the colony delegated to him as a viceroy, and represented the King in the government of that colony, there would be good reason to contend that an act of sovereignty done by him would be valid and obligatory upon the subject, living within his government, provided the act would be valid if done by the sovereign himself, though such act might not be in conformity with the instructions which the governor had received for the regulation of his own conduct. The breach of those instructions might well be contended on this supposition to be matter resting between the sovereign and his deputy, rendering the latter liable to censure or punishment, but not affecting the validity of the act done. But if the governor be an officer merely with a limited authority from the Crown, his assumption of an act of sovereign power, out of the limits of the authority so given to him, would be purely void, and the courts of the colony over which he presided could not give it any legal effect. We think the office of governor is of the latter description, for no authority or *dictum* has been cited before us to show that a governor can be considered as having delegation of the whole royal power in any colony, as between him and the subject, when it is not expressly given by his commission. And we are not aware that any commission to colonial governors conveys such an extensive authority."

Again, it is said: "All that we decide is that the simple act of the governor alone, unauthorized by his commission, and not proved to be expressly or impliedly authorized by any instructions, is not equivalent to such an act done by the Crown itself."

In the well known case of the action brought by Mr. Phillips against Mr. Eyre, the former governor of Jamaica, for acts done by him, whilst he was governor, in suppressing an insurrection in that colony, the question raised was, whether the colonial act of indemnity was an answer to an action brought in England. That such an act was thought to be necessary, and that it was alone relied on as a defence to the action, raises a strong presumption that it had been thought that the action might, but for this act, have been maintained. It is to be observed, however, that the facts of the rebellion and of its suppression were averred in the plea by way of introduction to the act of indemnity, and 111] *Mr. Justice Willes, in delivering the judgment of the Exchequer Chamber, after saying that the court had discussed the validity of the defence upon the only question

argued by counsel, viz., the effect of the Colonial Act, adds, "but we are not to be understood as thereby intimating that the plea might not be sustained upon more general grounds as showing that the acts complained of were incident to the enforcement of martial law" ('). It is to be noticed that the nature of those acts, and the occasion upon which they were committed, were shown by distinct averments in the plea.

It is apparent from these authorities that the governor of a colony (in ordinary cases) cannot be regarded as a viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly intrusted to him. Let it be granted that, for acts of power done by a governor under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the governor may assume to do them as governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of State. When questions of this kind arise it must necessarily be within the province of municipal courts to determine the true character of the acts done by a governor, though it may be that, when it is established that the particular act in question is really an act of State policy done under the authority of the Crown, the defence is complete, and the courts can take no further cognizance of it. It is unnecessary, on this demurrer, to consider how far a governor when acting within the limits of his authority, but mistakenly, is protected.

Two cases from Ireland were cited by the defendant's counsel, in which the Irish courts stayed proceedings in actions brought against the lord lieutenant of Ireland. In these cases the lord lieutenant appears to have been regarded as a viceroy. In both the facts were brought before the court, and in both it appeared that the acts complained of were political acts done by the *lord lieutenant in his official capacity, and were assumed to be within the limits of the authority delegated to him by the Crown. The courts appear to have thought that under these circumstances no action would lie against the lord lieutenant in Ireland, and upon the facts brought to their notice it may well be that no action would have lain against him any-

(') Law Rep., 6 Ex., 81.

where. (*Tandy v. Earl of Westmoreland* (1); *Luby v. Lord Wodehouse* (2).)

Several cases were cited during the argument of actions brought against the East India Company, and the Secretary of State for India, in which questions have arisen whether the acts of the Indian government were or were not acts of sovereignty or state, and so beyond the cognizance of the municipal courts. The East India Company, though exercising (under limits) delegated sovereign power, was subject to the jurisdiction of the municipal courts in India, and it will be found from the decisions that many acts of the Indian government, though in some sense they may be designated "acts of state," have been declared to be within the cognizance of those courts. Thus, in the *Rajah of Tanjore's Case* (3), the question to be decided was thus stated by Lord Kingsdown in giving the judgment of the committee: "What is the real character of the act done in this case? was it a seizure by arbitrary power on behalf of the Crown of Great Britain of the dominion and property of a neighboring state, an act not affecting to justify itself on grounds of municipal law, or was it in whole or in part a possession taken by the Crown under color of legal title of the property of the late Rajah, in trust for those who by law might be entitled to it? If it were the latter, the defence set up, of course, has no foundation." This committee, in deciding the questions thus raised, held that the seizure was of the former character, and therefore not cognizable by a municipal court. The answer of the East India Company in that case did not rest on the simple assertion that the seizure was an act of state, but set out the circumstances under which the Rajah's property was taken. After referring to the treaties made with the Rajah, it averred that in entering into these treaties, and in treating the sovereignty and territories of Tanjore as lapsed to the East [113] India Company in trust for the Crown, the company acted in their public political capacity, and in exercise of the powers (referring at length to them) committed to them in trust for the Crown of Great Britain, and that all the acts set forth in the answer "were acts and matters of state."

In the case of *Forester and others v. Secretary of State for India* (4) in which the judgment of this committee was delivered on the 11th of May, 1872, a defence of the same nature as that in the last-mentioned case was set up; but

(1) 27 State Trials, 1246.

(2) 13 Moore, P. C., 22.

(3) 17 Ir. Com. Law Reps., 618.

(4) Law Rep., Ind. App. Sup. Vol., p. 10.

the decision there was on this point against the Secretary of State. In this suit also the answer set out the facts which were relied on to show that the action of the government complained of was a political act of State.

As far as their Lordships are aware, it will be found that in all the suits brought against the government of India, whether in this country or in India, the pleas and answers of the government have shown, with more or less particularity, the nature and character of the acts complained of, and the grounds on which, as being political acts of the sovereign power, they were not cognizable by the courts. (See the *Nabob of Carnatic v. East India Company* (1); *Ex-Rajar of Coorg v. East India Company* (2); *Rajar Salig Ram v. Secretary of State for India* (3), in which judgment was given by this committee on the 27th of August, 1872.)

None of these cases help the present plea. On the contrary, it appears from them not only that the facts were laid before the courts, but that the courts entertained jurisdiction to inquire into the nature of the acts complained of, and it was only when it was established that they bore the character of political acts of State that it was decided they could not take further cognizance of them. It is to be observed that the sovereign authority conferred upon the East India Company appears in acts of Parliament, and therefore, without being pleaded, the courts would have judicial notice of it.

Coming to the present plea, we find that, after stating that the defendant was Captain-General and Governor-in-Chief of the Island of Jamaica, the only averments in it are, that the acts *complained of were done by him as [114] governor of the island, and in the exercise of his reasonable discretion as such, and as acts of State. There is no attempt to show the occasion on which the seizure of the plaintiff's ship was made, nor the grounds on which that seizure, which is not in itself of the nature of an act of State, became and was such an act. The plea does not aver, even generally, that the seizure was an act which the defendant was empowered to do as governor, nor even that it was an act of State. It would have been contended at the trial, if issue had been taken, that it would satisfy the averments of this plea to prove that the defendant assumed to make the seizure as governor, and assumed to do it as an act of State, without showing that the act itself was an act of State properly so called, and was within the limits of his authority. It

(1) 1 Ves. Jun., 388.

(2) 29 Beav., 300.

(3) Law Rep., Ind. App. Sup. Vol., p. 119.

was said that the plea should be construed as requiring, by implication, proof of these matters; but having regard to its nature and form as a plea of privilege, this cannot properly be held to be its meaning. Their Lordships cannot but think it was designedly pleaded in its present shape. It was a preliminary plea intended to raise the question whether the governor, if acting *de facto* as such, and doing an act that he assumed and deemed to be an act of State, could be called on to show in the courts of the colony that the seizure complained of was really an act of State, of the nature and class of those which, as governor acting on behalf of the Crown, he had authority to do. The object of the plea plainly was to stop the court from entering upon such an inquiry; but upon the construction now sought to be given to it, this object would, from the first, have been frustrated, if issue had been taken, for the court must then have gone into the very inquiry which it was the manifest purpose of the plea to avert. It appears to their Lordships that the plaintiff could not have safely taken issue on it. He would have been met at the trial by the objection that it was a plea of privilege, pleaded as a preliminary plea to the jurisdiction, and neither was, nor was intended to be, an answer to an action.

It was contended that, under "The Supreme Court Procedure Law, 1872," of the colony, which provides that defects in form shall be disregarded, and that on demurrer the court shall give judgment according to the very right of [115] the cause, the judgment *should now be given for the defendant; but their Lordships think, for the reasons above given, that upon this ambiguous and defective plea a proper and final judgment on the right of the cause cannot be pronounced.

In the result, their Lordships must humbly advise Her Majesty to affirm the judgment of the court below, and with costs.

Solicitor for appellant: *The Treasury Solicitor.*

Solicitors for respondent: *Cookson, Wainewright & Pennington.*

An inhabitant of one belligerent country cannot maintain an action against a soldier of the hostile belligerent for a trespass to the property of the former, done by the soldier in the course of his military duty: *Broadway v. Rhem*, 71 N. C., 195, distinguishing *Bryan v. Walker*, 64 id., 141; *Franklin v. Vannay*, 66 id., 145; *Wilson v.*

Franklin, 68 id., 195. S. P., *Ford v. Suget*, 97 U. S. R., 594, 605.

An officer of the army of the United States, whilst serving in the enemy's country during the rebellion, was not liable to an action in the courts of that country for injuries resulting from his military orders or acts; nor could he be required by a civil tribunal to jus

tify or explain them upon any allegation of the injured party that they were not justified by military necessity.

He was subject to the laws of war, and amenable only to his own government.

Where any portion of the insurgent States was in the occupation of the forces of the United States during the rebellion, the municipal laws, if not suspended or superseded, were generally administered there by the ordinary tribunals for the protection and benefit of persons not in the military service. Their continued enforcement was not for the protection or the control of officers or soldiers of the army. A district court of Louisiana—continued in existence after the military occupation of the State by the United States, and authorized by the commanding general to hear causes between parties—summoned a brigadier general of the army of the United States to answer a petition filed therein setting forth that a military company had, pursuant to his orders, seized and carried off certain personal property of the plaintiff, who alleged that the seizure was unauthorized by the necessities of war or martial law, or by the superiors of that officer. Judgment by default was rendered April 9, 1863, against him for the value of the property. When sued in the Circuit Court of the United States upon the judgment, he pleaded that the property was taken to supply the army.

Held, on demurrer to the plea, that the State court had no jurisdiction of the cause of action, and that the judgment was void: *Dow v. Johnson*, 100 U. S. R., 158.

A private soldier, or subordinate officer, serving under the command of a military superior, cannot excuse a treasonable act on the ground of compulsion, unless he was forced, under a personal fear of death, into the service, and quitted it as soon as he could.

This doctrine applies wherever and so long as the duty of allegiance to an existing government remains unimpaired. Though a revolution is impending, the allegiance continues to be due, so long, at least, as the courts of justice of the government are open to maintain its peace, and afford the citi-

zen that protection which is the foundation of his duty of allegiance.

The accused owed a twofold allegiance to the United States, and to the State of Georgia. His duty of allegiance to the United States was coextensive with the jurisdiction of their government, and was, to this extent, independent of, and paramount to, his duty of allegiance to the State. It continued to be thus paramount so long, at least, as the courts of the United States could exercise their jurisdiction within the State. Though these courts have been closed since the capture of the fort, there was, at its date, no such conflicting enforced allegiance to the State as made him a public enemy of the United States, in contradistinction to a traitor: *United States v. Greiner*, 3 Western Law Monthly, 430.

The Commonwealth cannot be impleaded in its own courts except by its own consent, clearly manifested by act of the legislature: *Troy, etc., v. Com.*, 127 Mass., 43; *U. S. v. Lee*, 106 U. S. R., 196; *Goldsmith v. Revenue, etc.*, 6 Oregon, 250; *Fifth, etc., v. Long*, 7 Bissell, 502; *Carr v. Terrill*, 11 Wall., 199; *Board, etc., v. Gantt*, 76 Va., 455.

The Troy and Greenfield Railroad Company mortgaged its entire railroad, franchises and property to the Commonwealth, under the statutes of 1854, c. 226, and 1860, c. 202, to secure the payment of a loan made by the Commonwealth; and subsequently surrendered the same to the Commonwealth, under the statute of 1862, c. 156, § 2, which provided that "the right of redemption" should not be barred until a certain time after the completion of the road by the Commonwealth. Held, that the court had no jurisdiction, either under the general statutes, c. 63, § 128, c. 113, § 2, or c. 140, §§ 13-35, of a bill in equity, brought by the railroad corporation against the Commonwealth, to enforce this right of redemption: *Troy & Greenfield Railroad v. Commonwealth*, 127 Mass., 43.

The Governor is exempt from the process of the courts whenever engaged in any duty pertaining to his office, and his immunity extends to his subordinates and agents when acting in their official capacity: *Matter of Har-*

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tranft, 85 Penn. St. R., 433, 27 Am. R., 667.

The exemption of the Governor of the State from actions or proceedings to enforce the performance of duties devolved on him as executive, rests in the constitution, and cannot be waived by any legislative act: *St. Paul v. Brown*, 24 Minn., 517.

The Governor is the absolute judge of what official communications, to himself or his department, may or may not be revealed, and is the sole judge, not only of what his official duties are, but also of the time when they should be performed: *Matter of Hartranft*, 85 Penn. St. R., 433, 27 Amer. R., 667.

The President may dismiss a military or naval officer without the concurrence of the senate: *McElrath's Case*, 12 Ct. Claims, 201.

Though a State or the United States cannot be sued, one of its officers may be: *St. Paul, etc., v. Brown*, 24 Minn., 517; *The Arlington Case*, 3 Hughes, 36, affirmed 106 U. S. R., 191. See also *Lee v. Kaufman*, 3 Hughes, 139; *Bank v. U. S.*, 10 Court Claims R., 520.

But see *Carr v. United States*, 98 U. S. R., 433; *Carr v. Terrill*, 11 Wallace, 199; *Ex parte Morris*, 9 id., 604; *Holmes v. Sheridan*, 4 Western Jur., 339; *Board, etc., v. Gantt*, 76 Va., 455.

When the government enters the courts as a litigant, it waives its exemption from legal proceedings, and stands upon the same footing as private individuals: *U. S. v. Flint*, 4 Sawyer, 42.

The rights of the government are to be determined by the same rules of law as in the cases of individuals: *U. S. v. Smith*, 94 U. S. R., 214, 217; *U. S. v. Bank of Metropolis*, 15 Peters, 377; *Cook v. U. S.*, 96 U. S. R., 396; *Donald v. People*, 89 N. Y., 36.

As to the right of a military officer to forcibly take the property of an individual, and when he is liable for so doing, see *Harmony v. Mitchell*, 13 How. U. S. R., 115, affirming 8 Leg. Obs., 329, 1 Blatchf., 549; *Coolidge v. Guthrie*, 8 Amer. L. Reg. (N.S.), 22, 1 Flippin, 97.

As to the rights and liabilities of a military officer, private or citizen, for acts done under the authority of a military officer, see *Wilson v. McKenzie*, 7 Hill, 95, 42 Amer. Dec., 51, 54-58 note; *Railroad v. Hurst*, 11 Heiskell

(Tenn.), 625; *Stoughton v. Dimick*, 3 Blatchf., 356.

The order of a superior military officer in the Confederate service, to burn all the cotton in the Mississippi valley, is a justification to a subordinate in a suit by the owner of cotton for burning it: *Ford v. Suget*, 97 U. S. R., 605.

See *East, etc., v. Garret*, 27 Gratt. (Va.), 167-8.

In time of war an officer has the right to arrest and imprison any one, whom he suspects and has reason from general representation or otherwise to suspect of giving aid and comfort to the enemy, or of intending to give such aid and comfort; and such arrest and imprisonment is according to the usages of civilized warfare: *White v. Crump*, 19 W. Va., 585.

If in time of war an act is done in good faith, with a view to assist the side in whose service the actor was engaged, and was such an act as would be recognized by civilized nations as according to the usages of civilized warfare, although done without special orders, the actor would not be held liable therefor: *White v. Crump*, 19 W. Va., 585.

Where a railroad company was under the military control of the government of the United States, and operated by its officers in the transportation of troops, munitions of war, and supplies in the suppression of the late rebellion, so that it was not in the free and unrestrained exercise of its franchise: Held, that the company was not liable as a common carrier for refusing to receive freights for transportation, it not being safe to undertake their carriage.

A railroad company cannot be excused for delay or neglect to transport freight on the ground of military interference on the part of the United States, where it accepts the same with a knowledge at the time that it could not properly transport the same on account of such interference. An agreement by an agent of a railroad company to furnish cars, at a future day, in which to transport grain and to receive and ship the same, will not estop the company, when sued in tort upon its common law obligation to receive and carry the same, from showing its right to refuse to receive the grain, owing to the military control of its road by the officers of the army of the United

States : *Phelps v. Illinois Central, etc.*, 94 Ills., 548.

All officers and agents of the Confederate government who, during the late war, acted under and by virtue of instructions from the department commander, issued under existing authority, are protected by such instructions from personal accountability : *Jones v. Williams*, 41 Tex., 390.

Plaintiff complained that defendant, E. (commanding officer at the Curragh Camp), caused to be placed on a parcel of ground next the plaintiff's premises certain filth, etc., from which foul and pestilential vapors arose which rendered the house and premises of the plaintiff unfit for human habitation, the defendant denied doing the act complained of. On the trial, it appeared that another defendant, B., a contractor, had contracted with the comptroller (who had the power of employing and of dismissing him) to deodorize said filth, and to remove same from said camp when required by E. so to do; and it further appeared that E. had not ordered the commission of the nuisance B. removed, but did not deodorize the filth. The jury found for the plaintiff, damages £10.

Held, that, inasmuch as E. had not ordered the commission of the nuisances, and inasmuch, also, as he had neither contracted with, nor had the power of dismissing the contractor, he was not responsible for the commission of the grievances complained of, and that the verdict must, therefore, be entered for the defendant : *Igoe v. Eveleigh*, Irish Rep., 4 Com. L., 238.

The order of a superior military officer, of itself, will not justify his subordinate in taking private property for public use : *Kooner v. Davis*, 72 N. C., 218 ; *Bryan v. Walker*, 64 id., 141.

When, with such order, there is an immediate military necessity for such taking, the subordinate will be justified : *Kooner v. Davis*, 72 N. C., 218.

Military authorities took possession of an asylum. The military officer in command sent out a party some miles into the country and took by force, from the farm of G., corn and bacon, which was sent to the asylum and used for the support of the inmates. After the war G. brought trover against the asylum to recover the value of the articles so taken and used.

Held, 1. That by the laws of war such property could not be taken without compensation, for the purpose of feeding the inmates of the asylum.

2. That the property having been taken without lawful authority, G.'s title to it was not divested, and it having been applied to the use of the asylum, he was entitled to recover its value from that corporation : *Eastern, etc., v. Garret*, 27 Gratt. (Va.), 163.

Where a military officer in an emergency impresses a wagon train against the consent of the owner, who protests and refuses to sign bills of lading, but performs the required service, an implied contract arises under the constitution : *Mason's Case*, 14 Ct. Claims R., 59.

The Court of Claims has no jurisdiction of an action for the value of property taken by our military forces in California during the war with Mexico from one then domiciled there : *Garcia v. U. S.*, 14 Court Claims R., 121.

Under the act of March 3d, 1819, authorizing the Secretary of War to sell "such military sites belonging to the United States as may have been found or become useless for military purposes," and the act of 28th of April, 1828, authorizing the President to "sell forts, arsenals, dockyards, light-houses, or any property held by the United States for like purposes," the Secretary of War had authority to execute the agreement it made with the Baltimore and Ohio Railroad Company on the 5th November, 1838, conceding to the company "authority to construct their railroad along and over their property" at Harper's Ferry, Virginia.

The grant by Congress to the President, of a right to dispose of the full title in fee in real property, implies the grant of all minor powers, and these powers may be exercised by the Secretary of War as agent of the President.

Where, under a contract perpetual in its purport, a license to use property for specific purposes is not specially restricted, and is coupled with an interest which was necessary to the possession and enjoyment of the rights acquired under the permission, the license is not revocable as long as the interest exists; and though the fee simple remains in the grantor, the right to use is paramount to the fee, and the doctrine of equitable estoppel

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applies against the grantor : United States v. Baltimore & Ohio Railroad Co., 1 Hughes, 138.

When, after an officer was dismissed from military service, another was ap-

pointed in his place, and he is subsequently restored, his restoration only takes effect from the time there is a vacancy : McElrath v. U. S., 12 Court Claims R., 201.

[5 Appeal Cases, 123.]

J.C.*, Nov. 25, 26, 27; Dec. 19, 1879.

[PRIVY COUNCIL.]

123] *ENGELTINA DIAS, *Plaintiff*; and ALFRED DE LIVERA, *Defendant*.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Roman-Dutch Law—Mutual Will—Construction—Gift to a Class—Gift to Husband and Wife and another.

A mutual will is by Roman-Dutch law in effect two wills, the disposition of each sharer being applicable to his or her half of the joint property.

Denyassen v. Mostert (1) approved.

Where A. and his wife C. (who survived him) by "mutual will" appointed their daughter, her husband, and her then existing child (the plaintiff), and also the other children "which may hereafter be procreated" by their daughter, to be the sole heirs of all the joint estate of A. and C. which should be left at the death of the first deceased of them, to be divided according to law amongst their daughter, her husband and her child, as also by the children which may be hereafter procreated by their daughter; and it appeared that no such children came into existence until after the death of A. and C.:

Held, that, on the due construction of the mutual will, A.'s intention was to divide his property (which he treated, movable and immovable, as one *corpus*) amongst the class of persons whom he had instituted his sole heirs, and that the distribution should take place when his will would become operative according to the ordinary rule of law. The words "which may be hereafter procreated" apply to children to be born between the date of his will and his death.

Held, further, that the daughter and her husband took, contrary to the English rule of construction, each a share, i.e., each a third of A.'s estate instead of a moiety thereof between them, Roman-Dutch law assuming husband and wife for most purposes to be two separate persons.

Held, further, that although the son-in-law took a third share of A.'s estate on A.'s death, yet as he died before C. his share of C.'s property lapsed into the residue, which on her death the daughter and the plaintiff were entitled to divide equally between them.

APPEAL from a judgment of the Supreme Court (June 19, 1877) affirmed by judgment on review (Nov. 16, 1877), **124]** whereby *a judgment of the District Court of Galle (May 12, 1876) was set aside, and the case referred back with certain directions to the District Court.

The facts of the case and the material clauses of the mutual will are set forth in the judgment of their Lordships.

**Present* :—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) Law Rep., 4 P. C., 236; 3 Eng. R., 112.

The judgment of the Supreme Court was as follows:

"We think that this joint will must be considered as 'speaking' from the death of Don Adrian, the spouse who first died. It dealt with all the common property. So far as concerned Don Adrian's share it became irrevocable, and must 'speak' from his death; and so far as concerns the wife's share, without going into the question whether she could have revoked it after his death, it is sufficient to observe that she never did attempt to revoke it after his death, but allowed it to remain what the joint testators intended it to be when they made it, a will final as from the death of the spouse first dying.

"It is contended by the plaintiff that the case falls under the English rule that when there is a gift to a class to be divided at a specified time, only those members of the class can take who were born before the specified period of distribution. We do not think the case does fall within that rule. In the first place we do not think that the testators have specified any period of distribution. The will bequeathed all the estate which shall be left at 'the death of the first dying spouse' 'to be divided' as hereinafter mentioned. Here the reference to the death of the first dying spouse is merely for the purpose of ascertaining the property which is to pass by the gift. There is nothing to show an intention that the distribution should take place then. In the second place we observe that the gift is to Merciana and her then husband, and her child already born, and to a class (the future children of Merciana), of which class not a single individual was in existence at the time from which, as we hold, the will speaks. This brings the case within the principle of another rule mentioned at p. 85 of Mr. Jarman's book, viz., that when there is an immediate gift to children, if there is no child *in esse* at testator's death, all subsequently born children will take. If under these circumstances the sharing were restricted to Engeltina, the mention of 'the other children' would be rendered merely insensible. We are of opinion that [25 the gift must be shared by all the children Merciana had by both husbands.

"We next have to consider whether, as the district judge has held, Merciana and her husband Dias take only one share between them or two. This district judge has decided on the authority of Lord Langdale's judgment in *Gordon v. Whieldon* (1), that they take only one share. In that case Lord Langdale, in the absence of any discoverable indica-

(1) 11 Beav., 170.

tion as to what shares the testator meant the legatees to take, held that they, husband and wife, as one person in law, would take only one share between them. We think that here, as in *Gordon v. Whieldon* (¹), the testators have not vouchsafed any expression of an intention one way or the other, but here the husband and wife are a husband and wife under the Roman-Dutch, and not under the English common law.

“At English common law, as Littleton lays it down, because husband and wife are one person only, if a joint estate in land be conveyed to husband and wife and a third person, the husband and wife shall take one moiety and the third person the other, and that, although at English common law the wife’s freeholds are not the husband’s absolute property. Are the husband and wife under the Roman-Dutch law to be similarly considered one person for the purposes of this gift? The wife’s position as regards property is very different under the two systems. It may perhaps be argued that this difference as to property should not prevent the husband and wife under Roman-Dutch law from being regarded as one person, inasmuch as the English husband can have no more than a life estate at most in his wife’s freeholds, and yet that does not prevent their being one person in law for the purpose of sharing a gift even of a freehold. The fact is that at English common law, although the wife has distinguishable rights as to her realty, her person is merged in that of her husband, her ‘personal property,’ that which attends the person, becomes her husband’s property absolutely; even her *choses in action* become his if he reduces these into possession while she lives. The English distinction between real and personal property is unknown to the Roman-Dutch law, but none of the wife’s property becomes the absolute property of the husband; on the contrary, the [26] joint *properties of both are thrown into a common stock administered by the husband during the marriage and divisible afterwards in moieties. The personality of the wife cannot be said to be merged in that of the husband under Roman-Dutch law. She is regarded as capable of contracting with her husband, as Voet points out in his title *de Ritu Nuptiarum* (XXIII, 2, 63), in the course of explaining some points in which the power of a husband over his wife is dissimilar to that to which minors, madmen, &c., are subject. This incident of itself is enough to prevent husband and wife from being regarded as one person only, and to

(¹) 11 Beav., 170.

this has to be added that under the Roman-Dutch law the husband and wife cannot be each other's heirs.

"Voet, indeed, in his title *de Testibus* (XXII, 5, 5) lets fall an expression which on a superficial view might perhaps be supposed to imply that he regarded this matter in the opposite light. He is discussing the reasons why a wife should not be compellable to give evidence for or against her husband, and says, '*Cum enim ex arctissimo matrimonii vinculo conjuges quasi in unum coaluerint.*' Here all that Voet means is to argue from the closeness of the marriage relation against the impolicy of compelling either spouse to what would be calculated to produce estrangement; we certainly do not regard him as intending to imply that the wife's personality is merged in her husband's, and a mere chance expression like this, even when employed by so eminent an authority as Voet, cannot avail against the undoubted characteristics of the married state under Roman-Dutch law. Under the English law the personality of the wife is merged in that of the husband; under the Roman-Dutch law the case is not one of merger but of mere subjection.

"For these reasons we think that we cannot restrict the participation of Merciana and her husband Dias in this gift to one share between them; we hold that each took one share.

"The result is, that the whole property passing under the gift is divisible into sevenths. Merciana's representatives take one share, Dias's representatives one share, Engeltina one share, and Merciana's other four children, or the respective representatives of each (for two are dead), one share each. Having thus laid down the principles according to which, in our judgment, the division is to be made, [127 it is unnecessary for us in this court to work out the arithmetical computations of the subdivisions of these seven shares.

"There being no dispute as to the subject-matter of the gift, the decree of the district judge is set aside and the case sent back, with directions to the district judge to carry out the apportionment of the property upon the principles which we have laid down."

Mr. *Bompas*, Q.C., and Mr. *Kenelm Digby*, for the appellant: By the law of Ceylon the property of husband and wife become on their marriage in the absence of special contract joint property, but is under the control and disposition of the husband. On the death of either, the property as it then exists, whether originally derived from the hus-

band and wife or acquired by either during the marriage is divided equally between the survivor and the representatives of the deceased. By the same law all wills are made by notarial deeds, and in the case of mutual wills they operate as to one share on the death of the first, and as to the other share on the death of the second. The true effect of the mutual will in this case was to divide the property to which it related into two equal shares, and to give one share to the daughter Merciana and her husband Dias who were married with community of property. The other moiety of the property to which the mutual will related went on its true construction to the appellant: *Bricker v. Whalley* (*).

Further, it was contended that no child of Merciana born after the death of Don Adrian and Cornelia, could have been entitled to any share so as to divest the appellant of any portion of the share vested in her under the will. The children of her second marriage were not in any event entitled to share in the property comprised in the will; which clearly contemplated a distribution amongst the persons entitled at a period not later than the deaths of the testator and testatrix. No child of Merciana born thereafter could take. There were no words indicating an intention to benefit the children of any subsequent marriage which she might contract. Reference was made to Williams on Executors [28] [8th ed. *1879], p. 1094, "The leading principle is that where a bequest is immediate to 'children' in a class of children in existence at the death of the testator, and these alone, are entitled; amongst which children *in ventre sa mère* are to be considered; and it will make no difference that the bequest is to children 'begotten or to be begotten.'" See *Mann v. Thompson* (*); *Butler v. Lowe* (*); *Tounshend v. Early* (*); *Storrs v. Benbow* (*); *Sprackling v. Ranier* (*); *Ringrose v. Bramham* (*); *Barrington v. Tristram* (*); Jarman on Wills [last ed.], vol. ii, p. 137; *Gilbert v. Boorman* (*); *Right v. Creber* (*); Hawkins on Wills, p. 71; *Scott v. Hurwood* (**).

Mr. Cookson, Q. C., and Mr. Bulley, for the respondent: All the children born to Merciana were entitled to participate in the property left by the testator; the words of the testator will not be cut down unless it is clearly necessary to do so in order to give effect to the intention. It is neces-

(*) 1 Vern., 233.

(*) Kay, 638.

(*) 10 Sim., 317.

(*) 28 Beav., 429.

(*) 2 M. & K., 46; 3 De G., M. & G.,

390.

(*) 1 Dick., 344.

(*) 2 Cox, 384.

(*) 6 Ves., 345.

(*) 11 Ves., 238.

(*) 5 B. & C., 866.

(*) 5 Madd., 332.

sary to wait where there is a gift to a class until the class is completed, and every member of it is *in esse* and able to take his share: see Jarman on Wills [3d ed.], vol. ii, p. 165; *Grey v. Pearson* (¹); *Towns v. Wentworth* (²); *Mogg v. Mogg* (³); *Gooch v. Gooch* (⁴); *Defflis v. Goldschmidt* (⁵); *Hensman v. Fryer* (⁶); *Lancefield v. Iggulden* (⁷); Theobald on Wills, p. 32; *Martineau v. Briggs* (⁸). With regard to the contention that Merciana and Dias took one share between them, viz., a moiety, it was contended that each took a third. The rule of English law does not apply in Ceylon and to persons governed by the Roman-Dutch law; if it did very slight evidence of an intention that husband and wife should take separately will defeat the operation of the English rule. Here the intention was that *each should take a third share. Reference was [129 made to Van Leeuwen's Roman-Dutch Law, p. 421; *Bricker v. Whatley* (⁹); *Warrington v. Warrington* (¹⁰); *Paine v. Wagner* (¹¹); *Gordon v. Whieldon* (¹²).

Mr. Bompas, Q. C., replied, referring to *Olivant v. Wright* (¹³); Thompson's Institutes of Ceylon, Duties of Executors, vol. ii; *Davidson v. Dallas* (¹⁴); *Warrington v. Warrington* (¹⁵); *In re Wylde* (¹⁶).

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER: The following are the material facts of the case now under appeal:

Don Adrian de Silva Goonetilleka Amarasiri Wardene Modliar (to be hereafter called Don Adrian), and his wife Cornelia Gertruda Authmisz (to be hereafter called Cornelia) being domiciled in Ceylon, and having one daughter Merciana Dorothea, married to Henry Thomas Dias Abeyesinghe Mohandiram (to be hereafter called Dias), by whom she had an only daughter, named Angeltina, made on the 17th of December, 1848, by a notarial deed, a "mutual will," a form of instrument well known to the Roman-Dutch law, which is in force in Ceylon.

The material parts of this will are as follows:

Firstly. These appearers declared to give and bequeathe to the poor a sum of £2, to be distributed according to the wish and discretion of the executors hereinafter named.

(¹) 6 H. L. C., 61.

(²) 11 Moore, P. C., 526.

(³) 1 Mer., 654.

(⁴) 14 Beav., 565; 3 De G., M. & G., 366.

(⁵) 2 Mer., 417; 19 Ves., 566.

(⁶) Law Rep., 3 Ch. Ap., 420.

(⁷) Law Rep., 10 Ch. Ap., 136; 11 Eng. R., 492.

(⁸) 23 W. R., 889.

(⁹) 1 Vern., 233.

(¹⁰) 2 Hare, 54.

(¹¹) 12 Sim., 184.

(¹²) 11 Beav., 170.

(¹³) 1 Ch. D., 846; 15 Eng. R., 779.

(¹⁴) 14 Ves., 576.

(¹⁵) 2 De G., M. & G., 724.

Secondly. These appearers declared to nominate, institute, and appoint their beloved daughter, Merciana Dorothea, and her husband Henry Thomas Dias Abeyesinghe Mohandiram, of Galle, and their child now existing and also the other children which may hereafter be procreated by their daughter, to be the sole heirs of all the estate, goods, effects, chattels and things whatsoever and wheresoever the same may be which shall be left at the death of the first deceased [30] *of the said appearers, whether movable or immovable, and of what kind or nature soever, which they the said appearers are now jointly in possession of as their common estate, that is to say, all the property which the first named appearer was possessed of jointly with his first wife Johannes Dias Lama Ettenay, who died about the year 1838, an inventory whereof is filed in the late District Court of Amblangodda in the matter No. 42, and all the property, both movable and immovable, which the said first named appearer has since acquired, to be divided according to law amongst their said daughter and son-in-law and their child as aforesaid, as also by the children which may hereafter be procreated by their daughter.

Thirdly. The appearers hereby declared to nominate and appoint the survivor of them, together with their aforesaid son-in-law, Henry Thomas Dias Abeyesinghe Mohandiram, to be the executors of the will of the first deceased of the appearers and administrators of his or her estate and effects, and the said appearers nominate the said Henry Thomas Dias Abeyesinghe Mihandiram to be the executor of this will after the death of both the said appearers and administrator of their estate, hereby giving and granting to them and him jointly or severally all such power and authority as are required or allowed in law, and especially those of assumption, substitution, and snrrogation.

Don Adrian died on the 6th of May, 1849.

On the 14th of August, 1858, Dias made a will, constituting his wife and daughter heirs of his estate, and died on the 1st of October, 1858.

Cornelia died on the 3d of September, 1864. Merciana married on the 13th of April, 1865, Alfred de Livera, by whom she had four children, two of whom had died before the commencement of the suit.

This action was brought by Angelina against Livera, her mother's second husband, complaining of his preventing her enjoying the share which she claimed of the properties dealt with by the will of Don Adrian and his wife, and praying to be declared entitled to one moiety of the properties

in Lists B and D, annexed to her libel, and quieted in the possession of the same. B is a list of all the now forthcoming properties which were disposed of by the [131 mutual will. D is a list of the properties held by Dias and Merciana during their marriage in community; and the first item in it, to which alone this suit relates, is "one half of all the lands mentioned in the annexed List B." Under the will of Dias the plaintiff is entitled only to one fourth of the property held by him and his wife in community, but in their Lordships' opinion it must be taken to have been admitted on the part of the defendant that Angelina was entitled to half of such property, whatever it may have been, if not by the operation of the will, by gift from her mother, or by family arrangement. By her libel, then, the plaintiff claimed in effect to be entitled to three fourths of the properties in B, viz., half by virtue of the mutual will, and one fourth by virtue of the will of Dias and the arrangement with her mother.

The questions in the cause, which arose on the construction of the will of Don Adrian and Cornelia, are, first, whether or not the children of Merciana by her second marriage were entitled to share under it; secondly, whether Merciana and Dias took each a share or one share between them.

The District Court of Galle found, firstly, that the children of the second marriage did not take; and, secondly, that Dias and Merciana took one share between them.

The Supreme Court found that the children of the second marriage did take, and that Dias and Merciana took each a share.

It was admitted by the counsel on both sides, and indeed appears to have been assumed by the courts, that the rules of construction applied to wills in this country apply to wills in Ceylon, modified as these rules must necessarily be in their adaptation to varying circumstances.

The Supreme Court appear to rest their decision on the first point above stated, mainly on the ground that the children "to be procreated" of Merciana formed of themselves a distinct class. They observe, "The gift is to Merciana and her then husband, and her child already born, and to a class (the future children of Merciana), of which class not a single individual was in existence at the time from which, as we hold, the will speaks. This brings the case within another rule mentioned at p. 85 of Mr. Jarman's book, viz., that where there is an immediate gift to children,

[132] if *there is no child in existence at the testator's death, all subsequently born children will take."

The counsel for the respondent conceded that the judgment could not be sustained on this ground, and admitted that the "class" to be benefited included Angelina, and, indeed, her father and mother. But he based his argument mainly on the following passage from Mr. Jarman's book on wills, and the authorities cited in support of it. (Jarman on Wills, 2d edition, vol. ii, p. 147.)

"We are now to consider how the construction is affected by the words 'to be born' or 'to be begotten' annexed to a devise or a bequest to children; with respect to which the established rule is, that if the gift be immediate, so that it would but for the words in question have been confined to children (if any) existing at the testator's death, they will have the effect of extending it to all the children who shall ever come into existence, since, in order to give to the words in question some operation, the gift is necessarily made to comprehend the whole."

In support of this proposition Mr. Jarman cites *Mogg v. Mogg* (¹) and *Gooch v. Gooch* (²).

He refers to *Mogg v. Mogg* (¹) in these terms, "Where a testator devised real estate to trustees in trust to pay the rents towards the support and maintenance of the child and children begotten and to be begotten of his daughter Sarah Mogg, it was contended that, notwithstanding the words 'to be begotten,' the devise could apply only to the children born before the testator's death, as these words might be satisfied by letting in the children born after the date of the will before the death of the testator. But the Court of King's Bench (in a case from chancery) certified that all the nine children of Sarah Mogg, including those who were born after the death of the testator, took under the devise; and Sir W. Grant, M.R., expressed his concurrence in the certificate."

It is to be observed that (in accordance with the then practice) no reasons are given for the certificate of the Court of King's Bench, which was to the effect that all the children of Sarah Mogg took as tenants in tail with cross remainders, nor were reasons given for the concurrence with it of the master of the rolls.

[133] *In *Gooch v. Gooch* (²) a testator devised lands to trustees in trust "during the lives and life of the longest liver of all the children of his daughter, Mary Gooch, hath or shall have," to apply the rents for the support of Mary

(¹) 1 Mer., 654.

(²) 14 Beav., 565.

Gooch and of all her children "which she shall from time to time have living," directing that when the youngest of her children who should live to attain twenty-one should have attained that age, the rents should be paid among the said children and the issue of such as should die leaving issue, and the survivor and survivors of them, during the life of the longest liver of the said children.

Sir John Romilly, M.R., held, on the authority of *Mogg v. Mogg* (1), that children born after the death of the testator were entitled under the trust for children during the minority of the youngest, yet that the time for admission of after-born children was not to be extended to the death of Mary Gooch, but to the period when the youngest child for the time being attained the age of twenty-one. His judgment proceeds much on the effect of particular expressions in the will.

Mr. Jarman, however, admits that this rule of construction does not apply to general pecuniary legacies, when the effect of letting in children born after the death of the testator would be to postpone the distribution of the general estate (out of which the legacies are payable) until the death of the parent of the legatees.

That children born after the death of the testator do not take under such circumstances has been held in many cases.

In *Storrs v. Benbow* (2), afterwards confirmed on appeal, Sir John Leach says, "this is an immediate gift at the death of the testator, and is confined to the children then living. The words 'may be born' provided for the birth of children between the making of the will and the death. The cases of *Sprackling v. Ranier* (3) and *Ringrose v. Bramham* (4) are direct authorities on this point. To give a different meaning to the words 'may be born' would impute to the testator the inconvenient and improbable intention that his residuary personal estate should not be distributed until the deaths of all the children of either of his brothers."

**Butler v. Lowe* (5) is to the same effect. There the [134 testator gave legacies to each of the children of his nephews and nieces "begotten or to be begotten." The Vice-Chancellor (Sir Lancelot Shadwell) held the gift confined to children born before the testator's death, and observed, "if there is a bequest to the children of A., begotten and to be begotten, it has been generally held that the words 'to be begotten' show only that the testator contemplated children

(1) 1 Mer., 654.

(2) 2 My. & K., 46.

(3) 1 Dick., 344.

(4) 2 Cox, 384.

(5) 10 Sim., 317.

to be born after the date of his will and before his death." The same principle was applied by Lord Eldon in *Whitbread v. Lord St. John* (*), where the words were "all the children born and to be born."

In *Parker v. Tootal* (*), Lord Westbury thus lays down the rule, "Whenever there are words used in a will indicative of a class, the words must be taken to denote the class, as it is constituted, either at the date of the will or at the death of the testator."

The late Mr. Justice Williams, than whom there is no higher authority, in his book on the law of executors and administrators, thus states the law applicable to bequests to children, "The leading principle is, that where a bequest is immediate to children as a class, children in existence at the death of the testator, and these alone, are entitled (amongst which children in *ventre sa mère* are to be considered), and it will make no difference that the bequest is to children 'begotten or to be begotten.'" In support of this proposition he cites the cases above referred to, as well as others, including *Mann v. Thompson* (*). He adds, however, in a note, "but a different rule prevails as to real estate," citing *Gooch v. Gooch* (*). He, of course, admits that a will disposing of personalty may be so drawn as to indicate a clear intention to include after-born children, in which case effect must be given to the intention, as was the case in *Defflis v. Goldschmidt* (*).

It does not appear necessarily to follow that a rule which applies where land is devised to trustees, with a continuing trust to pay the rents and profits to those persons who may from time to time become entitled to an equitable estate, [35] must apply where a will *contains a simple direction to executors to distribute the *corpus* of a fund.

It must be borne in mind that many of the distinctions made by our law, founded as it is in some measure on the feudal system, between real and personal property, the estates and interests in them respectively, and their mode of devolution, are unknown to the Roman-Dutch law, which recognizes no such estate as that to which the devisees were held entitled in *Mogg v. Mogg* (*). Though the question is not free from difficulty, their Lordships have come to the conclusion that the rule deduced from the authorities laid down by Mr. Justice Williams with respect to bequests of personal property is more applicable to the will now under

(*) 10 Ves., 152.

(*) 11 H. L. C., 164.

(*) Kay, 638.

(*) 14 Beav., 565.

(*) 1 Mer., 417.

(*) 1 Mer., 654.

consideration than the rule which was acted upon in *Mogg v. Mogg* ⁽¹⁾.

The testator, dealing with his property, whether movable or immovable, and treating it as one *corpus*, simply directs it to be divided among the class of persons whom he had instituted his sole heirs. It appears improbable that he should have intended to deprive his daughter, a member of that class, of the benefit of the gift he had made to her, by postponing the distribution of the fund until after her death, or even to postpone her enjoyment of it till she, then a young woman, had passed the age of child-bearing, and he may be reasonably assumed to have intended the distribution to take place when his will would become operative according to the ordinary rule of law. This interpretation gives effect to the words "which may be hereafter procreated," by applying it to children to be born between the date of the will and his own death. Whether, if grandchildren had been born between his death and that of his wife, they might have been entitled to a share of the whole or of half the property disposed of by the mutual will, does not arise, inasmuch as his wife died before the second marriage of his daughter.

On the question whether Merciana and Dias took one share or two, their Lordships agree with the Supreme Court.

The rule of English law that a gift to a man and his wife, and to a third person, is to be construed as a gift of a moiety to the husband and wife and a moiety to a third person, is founded on the doctrine of English law that husband and wife are, for most *purposes, one person. [136 And yet any indication, however slight, of an intention that each shall take separately has been held to defeat the application of this doctrine. *Warrington v. Warrington* ⁽²⁾, *Paine v. Wagner* ⁽³⁾, and other cases illustrate the nice distinctions which have been given effect to on this subject. Lord Justice Knight Bruce, in *In re Wylde* ⁽⁴⁾, attributes the rule to the position, which he describes as "peculiar," of husband and wife under our law.

Under the Roman-Dutch law the personal property of the wife is ordinarily, in the absence of special ante-nuptial agreement, held by the spouses as partners, each on the death of the other being entitled to his or her share, while in this country the whole personal property of the wife, including even such *choses in action* as he may reduce into

⁽¹⁾ 1 Mer., 654.

⁽²⁾ 2 Hare, 54.

⁽³⁾ 12 Simon, 184.

⁽⁴⁾ 2 De G., M. & G., 726.

possession, become the absolute property of the husband. It would not be difficult to point out many other important differences in the relations of husband and wife under the two systems of law ; indeed, so many are these differences, that it would not be incorrect to state as a general proposition that whereas the English law assumes a husband and wife to be, for most purposes, one person, the Roman-Dutch law assumes them to be, for most purposes, two. Their Lordships are of opinion that the reason of the rule which applies in England fails in its application to Ceylon, and they construe the words of the will, which direct a division of property among three persons according to what seems their natural meaning, viz., as directing its division into three parts.

But this view does not altogether dispose of the interest of Dias.

The Supreme Court appear to have assumed that the mutual will of Don Adrian and Cornelia "spoke," from the death of the first dying, and that, even if Cornelia might, after the death of her husband, have revoked it, yet, as she did not, it operated from that date upon the whole of the joint property.

Their Lordships cannot assent to this view. A mutual will is, as was pointed out by this board in *Denysen v. Mostert* (¹), in effect two wills, the disposition of each sharer being applicable to his or her half of the joint property.

1371 *They regard the expression in the will, "all the estates, goods, effects, chattels, and things whatsoever and wheresoever the same may be which shall be left at the death of the first deceased of the appearers," as having no other operation than to describe the property dealt with by the will, excluding, as they do, property after-acquired by the survivor.

Their Lordships are, therefore, of opinion that Dias took a third share of the property of Don Adrian on Don Adrian's death ; but that, inasmuch as he died before Cornelia, his share of her property lapsed into the residue, which on her death her daughter and her granddaughter were entitled to divide equally between them.

For these reasons their Lordships will humbly advise Her Majesty that the judgment appealed against be reversed, and that in lieu thereof it be declared that the children of Merciana by her second husband took nothing under the will of Don Adrian and Cornelia his wife. That upon the death of Don Adrian his half of the property dealt with by

(¹) Law Rep., 4 P. C., 236 ; 3 Eng. R., 112.

the will became divisible in three equal shares among Merciana, Dias, and the plaintiff, and that upon the death of Cornelia, her half of the property became divisible in equal shares between Merciana and the plaintiff; and that the plaintiff is entitled to half of the property held in community by Dias and his wife, and the cause be remitted, with these declarations, to the Supreme Court of Ceylon. There will be no costs of this appeal.

Solicitors for the appellant: *Cronin & Rivolta.*

Solicitor for the respondent: *Arthur Cayley.*

See 27 Eng. R., 515; 2 Amer. Prob. R., 469 note.

As to wills of the same person executed in duplicate, see 32 Eng. R., 358; *Matter of Crossman's Will*, 2 McCarthy's Civ. Proc. Rep., 394, and notes, pp. 394, 402-6.

There can be no such thing as a joint will to take effect upon the death of the survivor. A will must take effect at the death of the testator, and not at a time still in the future: *Hershy v. Clark*, 35 Ark., 17; 2 Amer. Prob. R., 464, 469 note.

Where the husband and wife join in the execution of what is in form a joint will, but which only disposes of property of which the husband is the sole owner, and the husband thereafter dies sole seized thereof, such instrument is the several will of the husband. The joinder of the wife has no effect upon the legal and disposing power of the husband, and all her declarations and acts are to be rejected as surplusage: *Allen v. Allen*, 28 Kans., 18.

[5 Appeal Cases, 138.]

J.C.*, Jan. 20, 21, 22, 23; Feb. 25, 1880.

[PRIVY COUNCIL.]

*MARIE ANNE CLAIRE SYMES and her Husband, [138
MARQUIS OF BASSANO, *Defendants*; and MARIE AN-
GÉLIQUE CUVILLIER and her Husband, ALEXANDER
MAURICE DELISLE, *Plaintiffs* (').

ON APPEAL FROM THE COURT OF QUEEN'S BENCH IN THE PROVINCE OF
QUEBEC, CANADA.

*Canadian Law—Donations—Revocability of Gifts par la survenance d'enfants
du donateur—Ordinance of 1731.*

By a notarial deed, dated the 29th of May, 1866, the appellant gave an annuity to the respondent in trust for her five daughters, "*pour partie de leurs frais de toilette et autres petits besoins personnels*," the capital sum being thereby settled upon the daughters after their mother's death. The gift was made soon after the appellant came of age, and amounted to about one-hundredth part of her whole estate; and it was to be presumed from the circumstances that if she had contemplated having children she would still have made it:

* *Present*:—SIR JAMES W. COLVILLE, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(') Affirming 5 L. C. Leg. News, 302.

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Banco de Portugal v. Waddell.

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Held, that, under these circumstances, by the law of Canada prior to the Civil Code (being that which existed in the jurisprudence of the Parliament of Paris before the Ordinance of 1731) the gift was not revocable on the birth of children.

The Ordinance of 1731 was not a mere declaration of existing law; and although it enacted that all gifts made by persons who had not children at the time of the donation "*de quelque valeur que les dites donations puissent être, et à quelque titre qu'elles aient été faites . . . demeureront révoquées de plein droit par la survenance d'un enfant légitime du donateur,*" yet such enactment did not take effect in Canada *proprio vigore*, never having been registered in Canada.

Hutchinson v. Gillespie (1), *Les Sœurs Hospitalières de St. Joseph v. Middlemiss* (2) approved.

Consequently the French law introduced into Canada by the Edict of 1663 re-139] maind unaffected by the Ordinance; and it was not proved and *could not be presumed that such law became altered or modified in consequence of the jurisprudence of the province having adopted the rules contained in the Ordinance.

(1) 4 Moore's P. C., 378.

(2) 3 App. Cas., 1102; 24 Eng. R., 681.

[5 Appeal Cases, 161.]

H.L. (E.), March 16, 19, 1880.

[HOUSE OF LORDS.]

161] *BANCO DE PORTUGAL, *Appellant*; and WADDELL, *Respondent*.

In re HOOPER and Another.

Bankruptcy—Double Proof—32 & 33 Vict. c. 71, s. 37—"In whole or in part"—Evidence.

Where traders possess two properties, one situated abroad, and the other situated in this country, and there has been a petition for adjudication here, followed immediately, in point of date, by proceedings in insolvency abroad, and the foreign court takes possession of the foreign property, as under a *caesio bonorum*, and employs it in paying the foreign creditors a dividend, such creditors cannot afterwards prove under the English adjudication, except on the condition of first accounting for what they have received abroad.

Two persons of the name of H. carried on trade in Portugal as wine exporters, under the style of H. Brothers, and the same two persons carried on trade in London as wine merchants, under the style of H. & Sons. The practice of the business was for H. Brothers to draw bills on H. & Sons. These bills were accepted in London and paid in Portugal. The traders fell into difficulties, and in December, 1877, presented a petition for adjudication under the English Bankruptcy Act. Proceedings in insolvency were taken in Portugal, after the date of the petition but before that of the adjudication, and the Portuguese court took possession of the property there, and the Portuguese creditors received a dividend of about 8s. in the pound. These creditors then sought to prove under the English adjudication. This was refused otherwise than as a claim, until they had accounted for what they had received under the Portuguese insolvency:

Held, that this conditional admission of their claim to prove was correct.

Selkirk v. Davies (1) followed, and *Ex parte Wilson* (2) approved.

The adjudication had relation back to the petition, from the date of which all the property of the traders abroad and in England became vested in the trustee.

The Statutes of Bankruptcy, 1861 and 1869, have no application to a case of two

(1) 2 Dow., 230; 2 Rose, 97-291.

(2) Law Rep., 7 Ch. Ap., 490.

bankruptcies, either in the same country or in different countries, against identically the same individuals.

Per LORD SELBORNE: The cases of *Maccahe v. Hussey* ⁽¹⁾, and *Atwood v. Small* ⁽²⁾ in no way warranted the supposition that this House would, on appeal, admit evidence not presented in the court below.

(1) 2 Dow. & CL, 440.

(2) 6 Cl. & F., 232.

[5 Appeal Cases, 176.]

H.L. (E.), Feb. 19, 23, 24, 26; March 1, 2, 4, 23, 1880.

[HOUSE OF LORDS.]

***THE NATIONAL BOLIVIAN NAVIGATION COMPANY, [176
THE MADEIRA AND MAMORÉ RAILWAY COMPANY, and
LLEWELLYN NASH, *Appellants*; and WILLIAM MILLAR
WILSON, J. H. LLOYD, ALFRED J. LAMBERT, and THE
REPUBLIC OF BOLIVIA, *Respondents*.**

Loan—Failure of Consideration—Foreign Government—Revocation of a Concession—Trustees—Costs.

Where money has been subscribed by bondholders for a particular purpose (such as the construction of a railroad) and part of that money has been placed in the hands of trustees for the bondholders, the duty of such trustees being to pay portions of the money as portions of the intended railroad are constructed, if no such railroad nor any portion of it is constructed, and its construction becomes impracticable, the bondholders are entitled to demand from the trustees repayment of what remains in their hands.

Where there is a right dependent on the practicability of doing a certain work, the question of its practicability is not to be determined solely by physical or financial reasons, but conditions previously stipulated (especially where the interests and the rights of third parties are concerned) must be considered.

Thus, where a loan was raised to make a railroad in a foreign country, *such loan being raised on the faith of a prospectus which set forth, as a [177 security to the bondholders, the grant of a concession by the foreign government, in virtue of which the bondholders would have the benefit of the custom duties imposed by that government on goods passing along that railroad, and the foreign government, finding the railroad not made, revoked its concession, the loss of the security which the concession had afforded to the bondholders, entitled them to treat the scheme as a failure, and to demand the return of their subscriptions.

A foreign government granted a concession, on the terms of which a company was formed and a loan raised, and bondholders constituted. The government afterwards revoked the concession:

Held, that its right to do so could not be questioned in any legal proceedings in this country.

Directions as to the form of the decree and as to costs.

[5 Appeal Cases, 214.]

H.L. (E.), March 4, 8, 9, 11, 15, 16, 23, 1880.

[HOUSE OF LORDS.]

214] *FREDERIC GUILDER JULIUS, *Appellant*; and THE
RIGHT REV. THE LORD BISHOP OF OXFORD; THE REV.
THOMAS THELLUSSON CARTER, *Respondents*.

Church Discipline Act—Discretionary Power of Bishop—"It shall be lawful."

The words in a statute "it shall be lawful" of themselves merely make that legal and possible which there would, otherwise, be no right or authority to do. Their natural meaning is permissive and enabling only.

But there may be circumstances which may couple the power with a duty to exercise it. It lies upon those who call for the exercise of the power to show that there is an obligation to exercise it.

The 3d section of the Church Discipline Act (3 & 4 Vict. c. 86), provides that in every case of any clerk in holy orders who may be charged with any offence against the Laws Ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or, if he shall think fit, of his own mere motion, to issue a commission under his hand and seal to certain persons for the purpose of making inquiry as to the grounds of such charge or report:

Held, that this section gave the bishop complete discretion to issue or decline to issue such commission.

The act recites that the manner of proceeding in cases for the correction of clerks requires amendment. Its provisions therefore may be construed independently of the practice under the previously existing law.

Per LORD BLACKBURN: There is no duty cast on the bishop by the statute, unless perhaps a duty to hear and consider the application, which in this case he has performed.

Enabling words are always compulsory where they are words to effectuate a legal right.

Reg. v. The Tithe Commissioners (1) and *Ditcher v. Denison* (2) commented on, and explained.

(1) 14 Q. B., 459-474.

(2) 4 Q. B. D., at p. 273.

Where a statute provides for the doing of an act for the sake of justice, or where it clothes a public body or officer with power to do an act which concerns the public interests or the rights of individuals, though the language of the statute be permissive merely, it will be construed as imperative, and the execution of the power may be insisted upon as a duty. In such cases "may" will be construed to mean "shall." *People v. Board Supervisors*, 51 N. Y., 401; *Phelps v. Hawley*, 53 id., 23; *People v. Supervisors*, 1 Buff. Super. Ct. R., 520; *Supervisors v. U. S.*, 4 Wall., 435; *Galena v. Avery*, 5 id., 705; *Brothers v. Pickel*, 81 N. J. Eq., 647, and elaborate note

by Mr. Stewart; *Fowler v. Perkins*, 77 Ills., 271.

A statute merely authorizing an act whenever an officer deems it for the best interests of the people of the State, or the allowance to a foreign insurance company to do business in the State, is directory, and not ministerial: *People v. Fairman*, 12 Abb. N. C., 352; *Id.*, 268.

The word "shall" is construed as "may," and to be directory where no public or private right is impaired by such construction, and where it is apparent that such was the intent of the statute: *Sedgw. on Stat.* (2d ed.), 375-7; *Newburgh, etc., v. Miller*, 5 Johns. Chy., 113 *et seq.*; *Carpenter v. Willet*, 1 Keyes, 516, and cases cited.

[5 Appeal Cases, 273.]

H.L. (Sc.), Feb. 28, 1880.

[HOUSE OF LORDS.]

***THE LORD ADVOCATE, *Appellant*; LORD LOVAT, [273
Repondent.**

Salmon Fishing—Barony Title—Immemorial Possession.

In 1774 the Crown granted to L. a barony charter to lands almost continuous on both sides of a river in Inverness-shire, included were older baronies containing express grants of salmon fishing to parts of the river, some above and some below certain falls, also an ancient barony grant giving the fishing on the Water of Forne, which was alleged to be the old name of the whole river from its source to the sea. From time immemorial L. had exercised his possession, up to 1862, taking all the fish in the whole river by means of close cruives, just below the falls, which stretched right across the river, and which were narrower than then allowed by law. Above the falls he asserted his right (a) by occasionally fishing there; (b) by during spawning season having watchers; (c) by taking his tenants in their leases bound to protect the fishing, and prevent all others from fishing. All which he had done for a period much longer than forty years. Since 1862, when close cruives were abolished, he had regularly fished above the falls with net and coble.

Neither the Crown nor any one else had ever objected to L.'s entire possession of the whole salmon fishing in the river. The Crown now, while admitting L.'s right to the salmon fishing below the falls to be incontestible, claimed, *de jure coronæ*, all the fishing above the falls:

Held, affirming the decision of the court below, that the river here was a *unum quid*—one continuous and connected subject—and that L.'s entire control and enjoyment of the whole profit of the fish in the whole river, for a time far beyond the period of prescription, coupled with his titles, gave him the right to the salmon fishing within the limits and *ex adverso* his barony lands wherever situated:

Held, also, that this decision was without prejudice to any right of the Crown or its grantees to the salmon fishing *ex adverso* the ancient barony lands of C., which were lands on the banks of the above mentioned river intermixed with L.'s barony lands.

See Lord Blackburn's opinion (p. 311) as to the extent of a grant to take fish by yairs or cruives.

[5 Appeal Cases, 317.]

H.L. (Sc.), March 12, 1880.

[HOUSE OF LORDS.]

***HOULDSWORTH, *Appellant*; CITY OF GLASGOW [317
 BANK AND LIQUIDATORS, *Respondents* (').**

Joint Stock Company—Action by Shareholder against the Company in Liquidation for Damage caused by Fraudulent Misrepresentations of Directors in inducing him to purchase Shares.

A person purchasing a chattel or goods, concerning which the vendor makes a fraudulent misrepresentation, may on finding out the fraud elect to retain the chattel or goods, and still have his action to recover any damage he has sustained. But the same principle does not apply to shares or stock in a joint stock company, for a

(') Affirming Court Sess. Cas., 4th Series, vol. 6, p. 1164; 16 Scot. L. Repr., 700.

1880

Houldsworth v. City of Glasgow Bank.

H.L. (Sc.)

person induced by the fraud of the agents of a joint stock company to become a partner in that company can bring no action for damages against the company whilst he remains in it: his *only* remedy is *restitutio in integrum*, and rescission of the contract; and if that becomes impossible—by the winding-up of the company or by any other means—his action for damages is irrelevant, and cannot be maintained.

H. bought from the City of Glasgow Bank, a copartnership registered under the Companies Act, 1862, £4,000 of its stock in February, 1877.

He was registered as a partner, received dividends and otherwise acted as a partner ever since. The bank went into liquidation in October, 1878, with immense liabilities: and H. was entered on the list of contributories, and paid calls. In December, 1878, H. raised an action against the liquidators, to recover damages in respect of the sum he had paid for the stock; the money he had already paid in calls; and the estimated amount of future calls. He founded his right to relief upon the ground of fraudulent misrepresentations made by the directors and other bank officials to him. He admitted that after the winding-up had commenced it was too late for him to have rescission of his contract, and *restitutio in integrum*:

Held, affirming the decision of the court below, that, even although the fraudulent misrepresentations might, if the bank had been a going concern, have entitled him to rescind his contract, rescission being now impossible, as decided by *Oakes v. Turquand* (Law Rep., 2 H. L., 325), and *Tennent v. City of Glasgow Bank* (33 Eng. R., 395), they afforded no ground for an action against the liquidators; therefore the action was irrelevant.

APPEAL against a judgment of the Court of Session in Scotland.

The City of Glasgow Bank was an unlimited company, incorporated and registered under the Companies Act, 1862, and had by virtue of its articles of copartnership power to deal in its own shares.

318] *In February, 1877, Arthur Hooton Houldsworth, the appellant, purchased £4,000 of the bank stock, from the bank itself, at the price of £9,000. He was duly entered as a partner in the register of members; received dividends; and continued to be a partner ever since.

On the 2d of October, 1878, the bank stopped payment; and never resumed business. And on the 22d of the same month an extraordinary resolution to wind up the bank was passed; and liquidators were appointed. The appellant was entered on the list of contributories, and paid calls.

On the 21st of December, 1878, he raised this action against the bank and its liquidators to recover damages in respect of (1.) £9,046 5s. 3d., the price of stock and stamp duty; (2.) the sum of £20,000, being loss sustained by him through paying the amount of the first call; and (3.) the sum of £200,000, the estimated amount of future calls which may be made upon him. And he founded his claim on the ground that he was induced to buy the £4,000 stock by means of the fraudulent misrepresentations and concealments of the manager, and directors. In his form of action he did not attempt to obtain rescission of the contract and restitution, even in a question *inter socios*.

The Lord Ordinary (1) assoilized the respondents from the conclusions of the summons; and stated in his note that he was of opinion that the case was ruled by the decision of this House in *Addie v. Western Bank* (2).

On a reclaiming note against the Lord Ordinary's interlocutor, the First Division of the Court of Session, on the 4th of July, 1879 (Lord Shand dissenting), dismissed the appellant's action as irrelevant (3).

Feb. 16, 17. *The Lord Advocate* (Right Hon. W. Watson), and Mr. *Herschell*, Q.C. (with them Mr. *Romer*), contended, for the appellant, that the principal was liable for the fraud of his agent acting within the sphere of his business; and that that was equally the case where the principal was an incorporated company *acting through [319 its directors, and, therefore, prior to liquidation the company here were liable, in respect of the fraud of the directors, to make reparation for the loss suffered by the appellant. See *Barwick v. English Joint Stock Bank* (4); *Mackay v. Commercial Bank of New Brunswick* (5), approved in *Swire v. Francis* (6); see also *Denton v. Great Northern Railway Company* (7); *Swift v. Winterbotham* (8); dictum of Lord Coleridge in *Swift v. Jewsbury* (9); *Weir v. Bell* (10), affirming *Weir v. Barnett* (11); opinion of Lord Cranworth in *Reedie v. London and North Western Railway Company* (12); of Holt, J., in *Hern v. Nichols* (13); also of Parke, B., in *Cornfoot v. Fowke* (14); and also Bell's Com. (7th ed.), 1, 6, 14; Clark on Partnership, vol. i, p. 257; *Jardine v. Carron Company* (15); *National Exchange Company of Glasgow v. Drew and Dick* (16), which last case was distinguished from *Burnes v. Pennell* (17), affirming *Forth Main Insurance Company v. Burnes* (18); *Traill v. Smith's Trustees* (19); *Clydesdale Bank v. Paul* (20). The respondents relied on *Addie v. Western Bank* (21), but the argument in that case before the House was chiefly on the question of

(1) Lord Rutherford Clark.

(2) Law Rep., 1 H. L. Sc., 145.

(3) Court of Session Cases, 4th Series, vol. vi, p. 1164; Scot. Law Repr., vol. xvi, p. 700.

(4) Law Rep., 2 Ex., 259.

(5) Law Rep., 5 P. C. App., 394, and at pp. 410, 412; 9 Eng. R., 202.

(6) 3 App. Cas., 106, at p. 114; 24 Eng. R., 56.

(7) 5 E. & B., 860.

(8) Law Rep., 8 Q. B., 244; 5 Eng. R., 202.

(9) Law Rep., 9 Q. B., 301, at p. 312.

(10) 3 Ex. D., at p. 238.

(11) 3 Ex. D., p. 32; 31 Eng. R., 132, 235.

(12) 4 Ex., 244, at p. 255.

(13) 1 Salk., 288.

(14) 6 M. & W., 358, at p. 373.

(15) Court Sess. Cas., 3d Series, vol. ii, p. 1101.

(16) 2 Macq., 103.

(17) 2 H. L. C., 497; 6 Bell's App., 541.

(18) Court Sess. Cas., 2d Series, vol. x, p. 689.

(19) Court Sess. Cas., 4th Series, vol. iii, p. 770.

(20) Court Sess. Cas., 4th Series, vol. iv, p. 626.

(21) Law Rep., 1 H. L. Sc., 145.

rescission of the contract; see report⁽¹⁾, and one of the chief differences between that case and this was that there, subsequently to Addie's purchase, but before he had made any claim for either restitution or damages, the bank was changed from an ordinary joint stock company to an incorporation. And Lord Cranworth seemed to have rested his opinion on that peculiar circumstance, being of opinion that the new incorporation did not take over the liabilities for claims of damages against the former company founded on the fraud of its officials. The committee of the Privy Council 320] in **Mackay v. Commercial Bank of New Brunswick*⁽²⁾ held that *Addie v. Western Bank*⁽³⁾ was decided upon that fact, which did not arise in the case before them or in *Barwick v. English Joint Stock Bank*⁽⁴⁾; and, further, the committee approved of Lord Cranworth's observation "that if by the fraud of the company's agent third parties have been defrauded, the corporation may be made responsible to the extent to which its funds have been benefited;" and here the bank had been largely benefited, for when the appellant purchased the shares if the true state of the bank had been known they would have been worth less than nothing. Then Lord Chelmsford,—the only other Law Lord who decided Addie's case,—based his judgment exclusively on the right to rescind, and therefore did not take the same view of the case as Lord Cranworth. Also, though Lord Chelmsford remarked that an action of deceit does not lie against a company for the fraud of its directors, that remark was inconsistent with other parts of his judgment, where he concedes (a) that the fraudulent representations of the directors of such a company are imputable to the company, and (b) that the company can retain no benefit which it has derived from them. Those two points covered the whole contention and were sufficient for the appellant's case.

They further maintained that the defrauded partner had his choice of reducing the contract, into which he was led by fraud; or of claiming damages without reducing the contract; for see *Amaan v. Handyside*⁽⁵⁾; Lindley on Partnership [4th ed.], pp. 717, 923; Sedgwick on Damages [4th ed.], p. 339; Stair, Inst. 1, 9, 14. And dealing with a going company, was there any principle in law which would make the action for damages inapplicable?

[EARL CAIRNS, L.C. : I quite understand why such an

⁽¹⁾ Law Rep., 1 H. L. Sc., at p. 148.

⁽⁴⁾ Law Rep., 2 Ex., 259.

⁽²⁾ Law Rep., 5 P. C. App., 594, at pp. 410, 413; 9 Eng. R., 202.

⁽⁵⁾ Court of Sess. Cas., 3d Series, vol. iii, p. 526.

⁽³⁾ Law Rep., 1 H. L. Sc., 145.

action should not be applicable : on your becoming a shareholder you must have divorce, or cannot have compensation.]

On general principle one can retain the shares, and yet get damages.

[EARL CAIRNS : During the last quarter of a century the *courts have been inundated with cases of this kind ; [321 and yet there is no case where such a contention has been put forward.]

Because rescission is more appreciable, and more sought for.

Then having this alternate right before liquidation, they submitted liquidation did not extinguish the liability, but it was enforceable by an action against the liquidators. Liquidation was not the repudiation of the debts and liabilities, but on the contrary was the ascertainment of the amount of such ; see opinion of Lord Chelmsford in *Waterhouse v. Jamieson* (*) ; and Lord Cairns in *In re Duckworth* (*).

It could not be said that the liquidators had not sufficient means of satisfying the appellant's claim, for the old shareholders had not yet been called upon. Therefore, it followed that though the winding-up put an end to rescission and restitution, *Oakes v. Turquand* (*), the right of an action for damages remained ; see *dictum* of Lindley, J., in *Stone and Collins v. City and County Bank* (*), where he decided against the plaintiffs on the express ground that they had not brought their action for damages ; see also the *dicta* of Bramwell, L.J., Brett, L.J., and Cotton, L.J., in that case on appeal (*).

It was not inconsistent that the appellant should have damages against the company of which he was a member ; nor that he should have to pay a share towards his own damages. The act of 1862, sects. 158, 131, expressly provided for the proof against the company of the debts of all descriptions including damages ; also such a claim as the appellant's was sanctioned, or at least not prejudiced by sect. 38, sub-sect. 7. There was no limitation to a case of fraud, therefore the appellant's remedy was not limited to rescission. He was entitled to claim in the liquidation, though himself being a member he would be liable to pay calls *pro tanto* with the other members ; but he was in the claim for damages to be regarded as an independent person,

(*) Law Rep., 2 H. L., Sc., at p. 37.

(*) Law Rep., 2 Ch App., at p. 580.

(*) Law Rep., 2 H. L., 325.

(*) 3 C. P. D., 282, at p. 299 ; 30 Eng. R., 156.

(*) Ibid, at p. 306 ; 30 Eng. R., 156.

quite apart from his character as a partner. See also, beside 322] cases previously cited, **New Brunswick Company v. Conybeare* (1); *Ranger v. Great Western Railway Company* (2); *Scholefield v. Templer* (3).

Mr. *E. E. Kay*, Q.C., Mr. *Benjamin*, Q.C., Mr. *Davey*, Q.C., and Mr. *Balfour* appeared for the respondents; but were not called upon to address the House.

The Law Peers having considered their judgment, delivered the following opinions:

March 12. EARL CAIRNS, L.C.: My Lords, in this case the appellant bought from the City of Glasgow Bank £4,000 of its stock in February, 1877, paying £9,000 for it. He was registered as a partner, received dividends, and otherwise acted as a partner. When the bank went into liquidation in October, 1878, he was entered on the list of contributors, and has since then paid very large sums for calls. On the 21st of December, 1878, he commenced the present action against the liquidators to recover damages in respect of the sum he had paid for shares and the moneys he has since paid for calls, and he founds his right to relief upon the ground of fraudulent misrepresentations made by the directors and others connected with the bank, for whose representations he alleges the bank was answerable.

As the question is one of relevancy, I will assume that the allegations of fraudulent misrepresentations are such as that if the bank had been a going concern the appellant would have been entitled to rescind his contract and to have recovered back all sums paid in respect of his shares. The Court of Session has been of opinion that even although the averments amount to what I have stated, still they afford no ground for an action against the liquidators, and they have dismissed the action with costs. In my opinion the court was right.

It was admitted before your Lordships, as indeed it could not be denied, that after the winding-up of the company commenced it was too late for the appellant to repudiate his 323] stock, and that *he must remain, as the liquidation found him, a partner in the bank and a contributory as such. It also came to be admitted in the course of the arguments at your Lordships' bar that if the appellant, remaining a partner, had a right to raise an action for damages against the liquidators after the winding-up, he must also have had a right before the winding-up to have remained a partner, and also then to have brought an action for

(1) 9 H. L. C., 711.

(2) *Joh.*, 155; 28 L. J. (Ch.), 452.

(3) 5 H. L. C., 72.

damages. It appears to have been contended in the court below that the appellant might be unable to maintain the present action as a claim in the liquidation to be satisfied *pari passu* with other creditors, and yet might be able to maintain it as a claim against the company or against shareholders in the company after all other creditors were satisfied. In the argument at your Lordships' bar I think it was felt to be impossible to maintain this theory of a deferred or secondary right of action against the company. I am satisfied there is no foundation for it. The winding-up act has no provisions for the payment of claims against the company except the claims of creditors. Creditors are supposed to be paid *pari passu*, and there is no provision after they are paid for opening up fresh claims by a contributory against the company. There are, indeed, provisions which, after the debts are paid, enable any inequalities in the contributions of the contributories to be set right, but that is quite a different matter.

The question, therefore, mainly argued at your Lordships' bar, and upon which the decision of this case must, as I think, depend, was this: Can a man, induced by the fraudulent misrepresentations of agents of a company to take shares in the company, after he discovers the fraud, elect to retain the shares, and to sue the company for damages?

There is no doubt that according to the law of England a person purchasing a chattel of goods, concerning which the vendor makes a fraudulent misrepresentation, may, on finding out the fraud, retain the chattel or the goods and have his action to recover any damages he has sustained by reason of the fraud. I will assume, although no distinct authority has been produced, and I do not wish to express a decided opinion upon it, that the law of Scotland in the case of a chattel or of goods is the same as that of England.

But does the same rule apply to the case of shares or stock in a *partnership or company? We are ac- [324
customed to use language as to such a sale and purchase as if the thing bought and sold were goods or chattels, but this it certainly is not. The contract which is made is a contract by which the person called the buyer agrees to enter into a partnership already formed and going, taking his share of past liabilities, and his chance of future profits or losses. He has not bought any chattel or piece of property for himself; he has merged himself in a society, to the property of which he has agreed to contribute, and the property of which, including his own contributions, he has agreed shall

be used and applied in a particular way and in no other way.

Does, then, the principle which in the case of a chattel admits of an action for damages, apply to the case of a partnership contract such as I have described?

I may go some way to answer this question to observe that, although during the last quarter of a century actions in every shape and form have been brought or attempted to be brought arising out of dealings in shares alleged to have been fraudulent, no case could be mentioned at the bar in which an action for damages has been sustained, the plaintiff retaining his position in the company. A few *dicta* were referred to, but they were of so vague and hypothetical a character that they are not deserving of further examination.

I will, however, ask your Lordships to look at the case on principle.

A man buys from a banking company shares or stock of such an amount as that he becomes, we will say, the proprietor of one hundredth part of the capital of the company. A representation is made to him on behalf of the company that the liabilities of the company are £100,000, and no more. His contract, as between himself and those with whom he becomes a partner, is that he will be entitled to one hundredth part of all the property of the company, and that the assets of the company shall be applied in meeting the liabilities of the company contracted up to the time of his joining them, whatever their amount may be, and those to be contracted afterwards, and that if those assets are deficient the deficiency shall be made good by the shareholders ratably in proportion to their shares in the capital of the 325] company. This is *the contract, and the only contract, made between him and his partners, and it is only through this contract, and through the correlative contract of his partners with him, that any liability of him or them can be enforced.

It is clear that among the debts and liabilities of the company to which the assets of the company and the contributions of the shareholders are thus dedicated by the contract of the partners, a demand that the company, that is to say, those same assets and contributions, shall pay the new partner damages for a fraud committed on himself by the company, that is, by himself and his copartners, in inducing him to enter into the contract which alone could make him liable for that fraud, cannot be intended to be included. Any such application of the assets and contributions would not

be in accordance but at variance with the contract into which the new partner has entered.

He finds out, however, after he joins the company, that the liabilities were not £100,000 but £500,000. He is entitled thereupon, as I will assume, to rescind his contract, to leave the company, and to recover any money he has paid or any damages he has sustained; but he prefers to remain in the company and to affirm his contract, that is to say, the contract by which he agreed that the assets of the company should be applied in paying its antecedent debts and liabilities. He then brings an action against the company to recover out of its assets the sum, say £4,000, which it will fall upon his share to provide for the liabilities, over and above what his share would have had to provide had the liabilities been as they were represented to him. If he succeeds in that action, this £4,000 will be paid out of the assets and contributions of the company. But he has contracted, and his contract remains, that these assets and contributions shall be applied in payment of the debts and liabilities of the company, among which, as I have said, this £4,000 could not be reckoned. The result is, he is making a claim which is inconsistent with the contract into which he has entered, and by which he wishes to abide; in other words, he is in substance, if not in form, taking the course which is described as approbating and reprobating, a course which is not allowed either in Scotch or English law.

My Lords, whatever differences may be pointed out between this *case and the case of *Addie v. The Western Bank* (1) in this House, I think the *ratio decidendi* in that case would go far, if it did not go the whole way, to decide the present appeal. But I entertain no doubt, for the reasons I have stated, that on principle, irrespective of authority, the decision of the Court of Session was right. I will move your Lordships to dismiss the appeal with costs.

LORD SELBORNE: My Lords, the principle on which the cases of *Barwick v. The English Joint Stock Banking Company* (2), *Mackay v. Commercial Bank of New Brunswick* (3), and *Swire v. Francis* (4) (relied upon by the appellant), were decided, was thus stated by Mr. Justice Willes in the former of those cases, and repeated (from his judgment) by the Judicial Committee in the two latter: "The master is liable for every such wrong of his servant or agent as is committed in the course of his service, and for the master's benefit,"

(1) Law Rep., 1 H. L. Sc., 145.

(2) Law Rep., 5 P. C., 394; 9 Eng. R., 202.

(3) Law Rep., 2 Ex. (Ch.), 259.

(4) 3 App. Cas., 106; 24 Eng. R., 56.

because, although the master may not have authorized the particular act, "he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." To the principle so stated no exception can, in my opinion, be taken, though the manner in which the master is to be answerable, and the nature and extent of the remedies against him, may vary according to the nature and circumstances of particular cases.

That principle received full recognition from this House in *The National Exchange Company v. Drew* ⁽¹⁾ and *New Brunswick Railway Company v. Conybeare* ⁽²⁾, and was certainly not meant to be called in question by either of the learned Lords who decided *Addie v. The Western Bank of Scotland* ⁽³⁾. It is a principle, not of the law of torts, or of fraud or deceit, but of the law of agency, equally applicable whether the agency is for a corporation (in a matter within the scope of the corporate powers) or for an individual; and the decisions in all these cases proceeded, not 327] on the *ground of any imputation of vicarious fraud to the principal, but because (as it was well put by Mr. Justice Willes in *Barwick's Case* ⁽⁴⁾), "with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." It is of course assumed in all such cases that the third party who seeks the remedy has been dealing in good faith with the agent in reliance upon the credentials with which he has been intrusted by the principal, and had no notice either of any limitation (material to the question) of the agent's authority, or of any fraud or other wrong doing on the agent's part at the time when the cause of action arose.

In the greater number, probably, of cases of this kind the question whether the fraud or other wrongful act of an agent could itself properly be imputed to his principal is not material; the liability of the principal to the third party, when properly measured by damages, being practically the same, whether he was privy to the wrongful act or not.

Sir Montague Smith in *Mackay v. Commercial Bank of New Brunswick* ⁽⁵⁾, criticised (perhaps justly) some expres-

⁽¹⁾ 2 Macq., 103.

⁽²⁾ 9 H. L. C., 711.

⁽³⁾ Law Rep., 1 H. L., Sc., 145.

⁽⁴⁾ Law Rep., 2 Ex. (Ch.), 259.

⁽⁵⁾ Law Rep., 5 P. C., 394; 9 Eng. R., 202.

sions which fell from Lord Cranworth in this House in the two cases of *Conybeare* and *Addie*, particularly in the latter case, in which Lord Cranworth said that "an incorporated company cannot, in its corporate character, be called on to answer in an action for deceit." The sequel of Lord Cranworth's words appeared to me to show that in using these expressions (perhaps technically inaccurate) he had substance, and not form, in view. In the old forms of common law pleading fictions were not seldom allowed, but not so as in the result to make the rights or remedies of the parties depend on the fiction rather than on the law applicable to the real facts which were allowed under those forms of pleading to be given in evidence. In *Barwick's Case* (*) a corporation was directly charged with fraud upon the pleadings (no mention being made of agency) and an objection taken on that ground was treated by Mr. Justice Willes as technical. "If" (he said) "a man is answerable for the wrong of another, whether it be fraud or other wrong, it may be described in pleading as the wrong of the person who is *sought to be made answerable in the action." And [328 all that was laid down by Sir Montague Smith in *Mackay's Case* (') itself was, that there might be cases in which to work out the appropriate remedy against a principal who had "profited by the fraud of his agent," the form of action, technically called "an action of deceit," might be either necessary or convenient; that very learned judge saying expressly that "the time had passed when much importance was attached to mere forms of actions;" and that "an action of deceit might be maintainable in which the fraud of the agent might be treated, for purposes of pleading, as the fraud of the principal."

In equity, one of the main heads of which has always been the redress of fraud, the constructive imputation of fraud to persons not really guilty of it has never been treated as the ground of relief, though the law of agency was administered according to the same rules in equity as at common law, and though in equity, as well as at law, an innocent principal might suffer for the fraud of an agent. Vice-Chancellors Knight Bruce and Parker, and Lord Chancellor Campbell (all very eminent judges) said (as Lord Cranworth and Lord Chelmsford also said in this House), that the law does not impute the fraud of directors to a company; and the same proposition would, I apprehend, be

(*) Law Rep., 5 P. C., at p. 410; 9 Eng. R., 219.

(²) Law Rep., 2 Ex. (Ch.), 259.

equally true, in the sense in which they intended it, if the principal whose agent was guilty of fraud were not a corporation but an individual. The real doctrine which Lord Cranworth, in *Addie's Case* (¹), meant (as I understand him) to affirm was one of substance and not of form: "An attentive consideration" (he said) "of the cases has convinced me that the true principle is that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the companies have profited by those frauds; but that they cannot be sued as wrongdoers by imputing to them the misconduct of those whom they have employed. A person defrauded by directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally."

329] *The words in this passage "to the extent to which the companies have profited by those frauds" may perhaps require some enlargement or explanation; but, subject to that qualification, I am of opinion that this doctrine is in principle right, and that the present case is one in which (as in the case of *Addie*) there would be a miscarriage of justice if the distinction which it involves were not attended to. This is not a case of parties at arm's length with each other, one of whom has suffered a wrong of which damages are the simple and proper measure, and which may be redressed by damages without any unjust or inconsistent consequences. For many purposes a corporator with whom his own corporation has dealings, or on whom it may by its agents inflict some wrong, is in the same position towards it as a stranger; except that he may have to contribute, ratably with others, towards the payment of his own claim. But here it is impossible to separate the matter of the pursuer's claim from his status as a corporator, unless that status can be put an end to by rescinding the contract which brought him into it. His complaint is, that by means of the fraud alleged he was induced to take upon himself the liabilities of a shareholder. The loss from which he seeks to be indemnified by damages is really neither more nor less than the whole aliquot share due from him in contribution of the whole debts and liabilities of the company; and if his claim is right in principle I fail to see how the remedy founded on that principle can stop short of going this length. But it is of the essence of the contract between the shareholders (as

(¹) Law Rep., 1 H. L., Sc., 145.

long as it remains unrescinded) that they should all contribute equally to the payment of all the company's debts and liabilities.

Such an action of damages as the present is really not against the corporation as an aggregate body, but is against all the members of it except one, viz., the pursuer; it is to throw upon them the pursuer's share of the corporate debts and liabilities. Many of those shareholders (as was observed by Lord Cranworth in *Addie's Case* ⁽¹⁾) may have come and probably did come into the company after the pursuer had acquired his shares. They are all as innocent of the fraud as the pursuer himself; if it were imputable to them it must, on the same principle, be imputable to *pursuer himself as long as he remains a share- [330 holder; and they are no more liable for any consequences of fraudulent or other wrongful acts of the company's agent than he is. Rescission of the contract in such a case is the only remedy for which there is any precedent, and it is in my opinion the only way in which the company could justly be made answerable for a fraud of this kind. But for rescission the appellant is confessedly too late.

I will not enlarge further upon the reasons for this conclusion, which I know will be more fully explained by others of your Lordships. But I must add that I think the Court of Session was right in holding the present question concluded by *Addie's Case* ⁽¹⁾. The only difference between *Addie's Case* and the present is this, that the Western Bank of Scotland was formed under 7 Geo. 4, c. 67, by which it was enabled to sue, and liable to be sued (upon all causes of action for which the shareholders for the time being were answerable) by its public officer; and it continued in that state till after the alleged frauds had been committed, so as to give a cause of action to the pursuer, Mr. Addie. The subsequent registration, under 20 & 21 Vict. c. 49, s. 8, was in my judgment sufficient to transfer from the unregistered to the registered company all liabilities upon any cause of action whatever for which the unregistered company might have been sued by its public officer immediately before the registration. I do not understand that there was really any difference between Lord Chelmsford and Lord Cranworth in that case; both appear to me to have founded their judgments upon those views of the law of agency on the one hand, and of fraud on the other, to which I have already referred. One expression, indeed, of Lord Cranworth, in that part of his judgment which relates to the question of

⁽¹⁾ Law Rep., 1 H. L., Sc., 145.

damages ("He comes too late"), might possibly, if it were not qualified by the subsequent context, have been taken to mean that even if the unregistered company had been liable to be sued for damages, by its public officer, down to the time of registration, that liability would not have been among the "debts and obligations" transferred by 20 & 21 Vict. c. 49, s. 8, to the registered company. Lord Cranworth was, I think, too good a lawyer and too accurate a thinker to have placed any such narrow (I had almost said 331] unreasonable) *construction upon such words in such a statute. He made, to my mind, his real meaning plain by what he went on to say; from which it is apparent that if the Western Bank had been incorporated before, and not after, the frauds then in question, the corporation would not, in his opinion, have been liable for those frauds in an action of this kind for damages. And that, my Lords, is precisely the present case.

LORD HATHERLEY: My Lords, I agree in the conclusions that have been arrived at by those of your Lordships who have addressed the House in this case.

I think that the following points may be considered as concluded by authority; at all events I shall assume them so to be for the purposes of the case before the House. First, that an agent acting within the scope of his authority, and making any representation whereby the person with whom he deals on behalf of his principal is induced to enter into a contract, binds his principal by such representation to the extent of rendering the contract voidable, if the representation be false, and the contracting party take proper steps for avoiding it whilst a *restitutio in integrum* is possible. Secondly, that a corporation is bound by the wrongful act of its agent no less than an individual, and that such misrepresentation by the agent being a wrongful act, the result of such misrepresentation must take effect in the same manner against a corporation as it would against an individual. Thirdly, that, if there cannot be a *restitutio in integrum*, the contract cannot be rescinded, but must remain in force, whatever right may exist in regard to damages for injury sustained by the party deceived.

My Lords, in this case it may be assumed for the present purpose that the contract is one which was obtained by fraudulent misrepresentation on the part of an agent or agents of the City of Glasgow Bank, whereby the appellant was led to purchase shares in that bank as though it were a profitable going concern, whereas it was in fact hopelessly insolvent, purchasing the privilege of becoming a shareholder, if it

were a privilege, or, rather, as it turned out, acquiring that unfortunate position, for the sum of *£9,000. In [332 about a year and a quarter after this purchase had been made the bank was in liquidation, and the appellant alleges that he has already contributed £20,000 towards the debts of the company, and also that he is liable to an extent which he puts in his condescendence as being possibly about £200,000 more in respect of the debts of the concern. He asks as a remedy to recover the sum that he paid for his shares, less certain small deductions mentioned in the case, and also to be indemnified as to the payment of the £20,000 and the possible future liability. This remedy he asks for as against the company, of which at the time of the bank going into liquidation he was a member or partner, and from which partnership he has never been discharged.

The main point in the case is whether he should be allowed to proceed further in such an action, that is to say, the question arises on relevancy in reference to the remedy which this gentleman seeks to obtain with regard to the injury which he says has been done to him. The Lord Ordinary held that the case was concluded by *Addie's Case*(¹), and the same view was entertained by three of the judges in the Court of Session. The principal difference between the present case and that of *Addie* is that in *Addie's Case*(¹) the company was not incorporated at the time of the purchase, but became so before the liquidation, whereas in the present case the company was incorporated before the time when the purchase was made by the appellant, and he became a shareholder. In the view which I take of the case, I do not consider that difference to be one which should render relief possible in this case, if it was proper to withhold it in the case of *Addie*. It appears to me to be fatal to the appellant's right to the relief he asks that he is still, or was at the date of the liquidation, a shareholder in the company against which he asks it. No case has been cited in which such a remedy as that sought by the appellant in the present case has been allowed to take effect by any court either in Scotland or in England.

What became the position of the appellant when he had paid his money in respect of the transfer of shares into his name? He thereby became on the one hand entitled to any profits made by the employment of the capital of the company according to the *proportion which his shares [333 bore to all the other shares in the company. And at the same time he undertook to bear a like aliquot share of all

(¹) Law Rep., 1 H. L., Sc., 145.

the debts and liabilities of the company incurred, or to be incurred, in respect of the business which the company was carrying on. Amongst the debts would be (if the appellant be right) the debt due to himself in respect of the damage sustained by him through the wrongful act of the company in inducing him by misrepresentation to place himself on the list of shareholders. It appears that he did draw dividends (I think three) of alleged profits out of the concern.

Now suppose, and I fear from other cases that have come before your Lordships' House the supposition is by no means an improbable one, suppose I say that there should be some ten or twelve other shareholders in a like position with the appellant with regard to purchasing shares under misrepresentation on the part of the company's agents, some of them having purchased shares before him and others after him; those ten or twelve shareholders would each of them have the same claim in respect of damages against the company (except in each case the party suing) as is now claimed by the present appellant. The present appellant would by his partnership contract have to bear his aliquot share of the damages that might be claimed by other misled shareholders who had been placed on the list by the same course of misrepresentation as himself. What end would there ever be to the interlacing claims on the part of misled shareholders *inter se* as to dividends received whereby the fund which might have been applied towards recouping and making good the debts of the company, including the damages claimed by the appellant, was diminished? How could they be retained by the appellant as against his fellow sufferers? He would clearly have to account for them as between himself and his fellow sufferers who would be claiming relief on the same grounds as himself.

In truth the appellant is trying to reconcile two inconsistent positions, namely, that of shareholder and that of creditor of the whole body of shareholders including himself. As has been observed already by those of your Lordships who have preceded me, amongst the various cases which have been brought before courts in respect of dealings with 334] joint stock companies, no case *can be adduced in which a person so claiming to be a shareholder has at the same time successfully asserted his claim against a company in liquidation for such a debt as this, namely, one in which he is himself a co-debtor with all his fellow shareholders to himself, and is himself in common with them responsible again to them individually for like liabilities irrespective of representations made by their common agent.

Some clauses in the Companies Act were cited in the course of the argument as showing the rights *inter se* on the part of shareholders of a company by which they were all to be brought into equality one with another when the settlement took place and arrangements for winding up were made by the liquidators. Those provisions as to liquidation for the purpose of equalizing the contributions of contributories *inter se*, do not appear to me to authorize such a scheme or contrivance as would be necessary in this case to effect the object proposed by the pursuer. Having omitted to obtain a rescission of the contract, he would have to make a complicated inquiry such as I have described as between himself and other shareholders who could put themselves in the same position as himself as regards misrepresentation by the common agent; and nothing has been pointed out in the act which leads to the supposition that any such inquiry as that was contemplated. What has really happened is this—he has had the misfortune, together with others, as I have said, in all probability, though that is not in evidence in this case, of being misled by the representations of the agent of the company. If your Lordships were to establish a precedent in his case there would probably be other claimants also, each of whom would have a claim which, it appears to me, could not be dealt with after the time for the rescission of the contract had gone by. If the appellant obtains the relief he has sought, every other shareholder in the same position as himself might come forward to claim a similar relief. What has really happened is that both he and those other shareholders in a like position, have suffered from the misfortune of having employed a dishonest agent. As between third parties to the company and the appellant, he might well be entitled to rescission of the contract whereby he became a shareholder, but, if time and circumstances have prevented that remedy and he must remain a shareholder, *I do not see how he can escape the bur- [335 den occasioned by the common misfortune of himself and many of the other shareholders in having employed dishonest agents. I therefore feel that whatever rights this gentleman may have acquired in the first instance, his case has been rendered hopeless by what has taken place since, by reason of which it has been placed beyond his power to put things in such a position that his name can be struck off the share list altogether, in which case he would, according to some of the authorities which have been cited, have stood in the position of a stranger with reference to misrepresentations made by agents of the company.

I agree with the order which has been proposed to your Lordships by my noble and learned friend.

LORD BLACKBURN: My Lords, I also think that it is not necessary to hear the counsel for the respondents, as after carefully considering the judgments below, and the arguments of the appellant's counsel, I have come to the conclusion that the interlocutor appealed against was right, and that the appeal should be dismissed with costs.

The Lord Ordinary based his judgment on this short ground: "The Lord Ordinary thinks that this case is ruled by the decision of the House of Lords in *Addie v. The Western Bank* (');" and that, if correct, was a sufficient ground for his decision. For when it appears that a case clearly falls within the *ratio decidendi* of the House of Lords, the highest Court of Appeal, I do not think it competent, for even this House, to say that the *ratio decidendi* was wrong. It must, however, in my opinion, always be open to a party to contend that the differences between the facts in the case then under discussion and those in the case on which the decision in the House of Lords proceeded are so material as to prevent his case from falling within the *ratio decidendi* of the House, even though the opinions of the learned and noble Lords who decided the case in the House are so worded as to seem to apply equally to the facts in the case then under discussion; for unless those differences in fact did exist in the case in this House, or at 336] least *the possibility of their existence was prominently brought forward, I think the House cannot be taken to have decided that such differences in fact might not make a material distinction in law.

I think, therefore, that it is important to inquire what are the differences of fact between this case and that of *Addie v. The Western Bank* ('), and then to determine whether they do make a material distinction in law.

The Western Bank was a copartnership carrying on the business of banking in Scotland under the provisions of 7 Geo. 4, c. 67. Whilst this was so, Addie entered into a contract with persons who were, though he did not know it, agents for the Western Bank to purchase shares in that bank. Addie paid to the agents of the bank the agreed consideration, and accepted shares, which in fact belonged to the bank, and in respect of them became a partner on the terms contained in the partnership deed of the Western Bank. Some time elapsed, and the Western Bank becoming insolvent stopped payment. Then advantage was taken

(¹) Law Rep., 1 H. L., Sc., 145.

of the provisions of the Joint Stock Banking Companies Act, 1857 (20 & 21 Vict. c. 49), s. 6, and it was resolved by a majority of the shareholders to register the Western Bank as a company, other than a limited company, under the provisions of the Joint Stock Companies Act, 1857. Addie was a party to this resolution. The Western Bank after registration was wound up. Addie was made a contributory, and he and such of the other contributories as were solvent paid calls, by means of which all the creditors were paid, and some surplus existing had to be returned to the contributories who had paid. Then, and not till then, Addie commenced his action in the Court of Session.

The interlocutor appealed against, which was reversed, was that of the 2d of February, 1864: "That the pursuer had stated matter relevant to go to trial."

The following appear to me to be the material statements in the case now before this House. The City of Glasgow Bank was originally, like the Western Bank, a copartnership carrying on business in Scotland under the provisions of 7 Geo. 4, c. 67. The deed of copartnership of this bank did not in any material respect differ from that of the [337 Western Bank. But whereas the Western Bank was registered under the provisions of the Joint Stock Banking Companies Act, 1857, after Addie had entered into the contract in respect of which he raised his claim, the City of Glasgow Bank was registered under the Companies Act, 1862, on the 29th of November, 1862, several years before the date of the transactions in respect of which the pursuer raises his claim; and the pursuer knew that he was purchasing shares the property of the bank, and dealing with the agents of the bank, whilst Addie was not aware of these facts; and this action was commenced earlier than that of Addie. It was commenced after the liquidation had begun, but before it was ascertained how much the solvent contributories would have to pay, or who would be solvent contributories.

I do not observe any other differences between the statements in the case now under discussion and the statements in the case of *Addie v. The Western Bank* (¹). And as I think that those differences of fact make no distinction in law, and as the interlocutor appealed against in this case seems to me identical in effect with that pronounced by this House, I agree with the Lord Ordinary that this case is ruled by the decision of the House in *Addie v. The Western Bank*.

(¹) Law Rep., 1 H. L., Sc., 145.

But one very important question was raised by the judgments in the Court of Session, and argued by the counsel at your Lordships' bar, which, if ever it becomes necessary to decide it, may require much consideration. The contract with a joint stock company to take shares in that company is a very peculiar one. Whether the company be, as the Western Bank was, a banking copartnership in Scotland under the 7 Geo. 4, c. 27, having such a deed of copartnership as that bank had, or a joint stock company registered under the Companies Act, 1862, the contract equally is in substance an agreement with the company to become a partner in the company on the terms that the partner shall, in common with all his copartners for the time being, contribute to make good all liabilities of the copartnership as if this incoming partner had been a member of the partnership from the beginning. Further, he consents that any one of his copartners may, by procuring a person to take his shares, get rid (at least *inter socios*) of his liability, 338] *substituting that of the incoming shareholders. I know of no other contract which in these respects resembles this contract.

It was with this peculiar kind of contract that the House of Lords had to deal in *Addie v. The Western Bank* (1), and it is with this peculiar kind of contract that your Lordships have now to deal. I do not think the House is called on now to decide whether a difference in the kind of contract induced by the fraud would make a sufficient distinction in law to prevent the decision in *Addie's Case* (1) from governing such a case as that.

I do not think there is now any doubt that when a contract is, in the language of the English common lawyers, induced by fraudulent deceit of the other contracting party, or of one for whom he is responsible, or, in the language of the civil law, when there is *dolus dans locum contractui*, the contract is not void but only voidable. And it follows from this that though the deceived party may rescind the contract and demand restitution, he can only do so on the terms that he himself makes restitution. If either from his own act, or from misfortune, it is impossible to make such restitution, it is too late to rescind. But though he cannot rescind he may, at least in English law, as against the person actually guilty of the fraud, recover damages (*Clarke v. Dixon* (2) and *Cole v. Bishop*, mentioned in that case by Justice Erle (3)). The Lord President in this case says, that the deceived party may rescind if the fraud inducing

(1) Law Rep., 1 H. L. Sc., 145. (2) E. & B., 148. (3) E. & B., at p. 153.

the contract was that of an agent acting in the principal's business and within the scope of his authority, though the principal was ignorant of the fraud, and free from all moral guilt, or even, being an incorporation, was necessarily incapable of knowing anything except by its agents, and therefore free from all moral guilt (if such a phrase can be properly applied to an incorporated body), and so far I think the position is not disputed. But when he proceeds to say that "when the result of the fraud is the making of a contract between the party deceiving (not personally but through an agent) and the party deceived, I am not aware that any remedy is open to the latter, except a rescission of the contract, or at least without a *rescission of the [339 contract," he states a proposition which is much controverted.

Lord Shand disputes it on principles and authorities of Scotch law well worthy of consideration, and then says:

The whole question has been very carefully considered in recent cases in England, in which it has been settled, on principles which I am satisfied are sound, that an incorporation will be answerable in damages for the fraudulent representations of its agents made in the course of the business intrusted to them: *Barwick v. The English Joint Stock Bank* (¹); *Swift v. Winterbotham* (²); *Mackay v. The Commercial Bank of New Brunswick* (³); *Swire v. Francis* (⁴); *Stone and Collins v. The City and County Bank, Limited* (⁵); *Weir v. Bell* (⁶). I say nothing of *Udell v. Atherton* (⁷), except that it was the decision of a court equally divided; that it was considered in most, if not all, of the subsequent cases just cited; and that I am not aware of any judgment since its date in which it was spoken of with approval, while it has been more than once referred to as a decision to be explained and accounted for on special grounds.

Barwick v. English Joint Stock Bank (¹) was decided just before the decision in *Addie v. The Western Bank* (⁸), and the noble and learned Lords who advised the House were not aware of that decision. I may here observe that one point there decided was that, in the old forms of English pleading, the fraud of the agent was described as the fraud of the principal, though innocent. This, no doubt, was a very technical question. The substantial point decided was, as I think, that an innocent principal was civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud. It is not necessary now to decide whether that was right or wrong as the law stood before the decision in *Addie v. The Western Bank* (⁸), nor, as I think, whether it is overruled by

(¹) Law Rep., 2 Ex., 259.

(²) Law Rep., 9 Q. B., 301; 5 Eng. R., 202.

(³) Law Rep., 5 P. C., 394; 9 Eng. R., 202.

(⁴) 3 App. Cas., 106; 24 Eng. R., 56.

(⁵) 3 C. P. D., 233; 30 Eng. R., 156.

(⁶) 3 Ex. D., 238; 31 Eng. R., 132, 235.

(⁷) 7 H. & N., 172.

(⁸) Law Rep., 1 H. L., Sc., 145.

that decision. *Mackay v. Commercial Bank* ⁽¹⁾ was decided after *Addie v. The Western Bank* ⁽²⁾, and was distinguished from it. I do not think your Lordships need now inquire whether successfully or not.

But it seems to me that Lord Chelmsford did not lay down any general position as to all contracts. He says: "The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this—where a [340] person has been drawn into *a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action of damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally. The action of Mr. Addie is for the reduction of the deeds of transference of the shares, and alternatively for damages. But as it is brought against the company, it will follow from what has been said that he cannot recover unless he is entitled to rescind the contract."

I cannot say whether Lord Chelmsford meant to confine his observations to the particular kind of contract then before him, without deciding whether the same doctrine would apply to all kinds of contracts, or whether it was only by accident that he confined his language as he did. There are strong reasons given by the noble and learned Lords who have already spoken in this case for holding that when one has been induced by the fraud of the agents of a joint stock company to contract with that company to become a partner in that company he can bring no action of deceit against the company whilst he remains a partner in it. There are reasons which would not apply to every case in which a contract has been induced by fraud, as for example, if an incorporated company sold a ship, and their manager falsely and fraudulently represented that she had been thoroughly repaired and was quite seaworthy, and so induced the purchase, and the purchaser first became aware of the fraud after the ship was lost, and the underwriters proved that

⁽¹⁾ Law Rep., 5 P. C., 394; 9 Eng. R., 202.

⁽²⁾ Law Rep., 1 H. L., Sc., 145.

she had not been repaired and was in fact not seaworthy, and so that the insurance was void when it would be too late to rescind.

Lord Cranworth uses language applicable to all contracts ; I cannot say whether he meant to apply the doctrine to all kinds of *contracts, however different from that with [341] which he was dealing. I do not say that the difference of the contract from that to buy shares would distinguish the case. All that I say is, that if such a case arises, the consideration of the question whether it is decided by *Addie v. The Western Bank* (¹) is not meant to be prejudiced by anything I now say.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 12th March, 1880.

Agents for appellants : *Simson & Wakeford*.

Agents for respondents : *Martin & Leslie*.

(¹) Law Rep., 1 H. L., Sc., 145.

[5 Appeal Cases, 342.]

J.C. *, Dec. 16, 1879.

[PRIVY COUNCIL.]

*JOSEPH TRIMBLE, *Plaintiff*; and GEORGE HILL, [342] *Defendant*.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Wagering Contract—Right to recover Deposit from Stakeholder—14 Vict. No. 9, s. 8—Construction.

The plaintiff deposited with the defendant £200 to abide the event of a match between a horse of the plaintiff and another horse belonging to G.; but before the day fixed for the race, he gave notice to the defendant that he revoked the authority to pay over the money, and demanded the return of it:

Held, that the plaintiff was entitled to recover such deposit. The contract under which the money was deposited was one by way of wagering, and therefore null and void under the Colonial Act, 14 Vict. No. 9, s. 8 (which is in the same terms as Imperial Act, 8 & 9 Vict. c. 109, s. 18). It was not an agreement to contribute a sum of money within the meaning of the proviso contained in the said section; which proviso applies to contributions other than wagers.

Diggle v. Higgs (¹) approved.

Where a colonial Legislature has passed an act in the same terms as an imperial statute, and the latter has been authoritatively construed by a court of appeal in England, such construction should be adopted by the courts of the colony.

* *Present*:—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(¹) 2 Ex. D., 422; 21 Eng. R., 524.

APPEAL from a judgment of the Supreme Court (Hargrave, J.J., Martin, C.J., dissenting) (Dec. 13, 1877), dismissing the plaintiff's appeal from a judgment of the Metropolitan and Coast District Court at Sydney (April 16, 1877), with costs.

The facts are stated in the judgment of their Lordships.

Mr. *J. C. Barnes* (Mr. *J. C. Mathew*, with him), for the appellant, contended that the judgments of the court below were erroneous. They proceeded on the ground that the money sought to be recovered had been contributed towards a sum to be paid to the winner of a lawful game within the 343] meaning of the Colonial *Act, 14 Vict., No. 9, s. 8 (which is identical with the Imperial Act, 8 & 9 Vict. c. 109, s. 18), and that, therefore, the action would not lie. But that was at variance with *Diggle v. Higgs*.⁽¹⁾ He submitted that the money sought to be recovered had been deposited under a contract which was not enforceable, and that, upon the revocation of the defendant's authority to retain the money, the defendant ought to have paid it back.

The respondent did not appear.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH: This appeal arises in an action brought by the appellant, Mr. Trimble, to recover from the defendant a sum of £200 deposited with him to abide the event of a match between a horse of the plaintiff and another horse belonging to Mr. Glenister. The agreement under which the deposit was made, or so much of it as is material, is in these terms: "4th April, 1877. Mr. Glenister agrees to run Gaffer Grey against Mr. Trimble's Beacon for the sum of £500 a side, £200 of which is deposited in the hands of George Hill, which said deposit money will be forfeited unless the whole of the stake is made good on Monday evening, the 10th day of April, between the hours of 8 and 10 p.m." Before the day fixed for the race, the plaintiff gave notice to the defendant that he revoked the authority to pay over the money, and demanded the return of it. The question upon these short facts arises on the 8th section of the Colonial Act, 14 Vict., No. 9, which is in the same terms as the 18th section of the Imperial Act, 8 & 9 Vict. c. 109. The enactment is: "And be it enacted that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void, and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall

⁽¹⁾ 2 Ex. D., 422; 21 Eng. R., 624.

have been deposited in the hands of any person to abide the event in which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution or agreement to subscribe or contribute for or towards any plate, prize, or sum of *money to be awarded to the winner or winners of [344 any lawful game, sport, pastime, or exercise." This enactment annuls all contracts by way of gaming or wagering; thus abolishing the distinction between legal and illegal wagers, which had frequently raised vexed questions for the consideration of the courts. All wagers, so far as actions to enforce them are concerned, are declared by it to be null and void. There can be no doubt that the contract in question is a contract by way of wagering; it is in fact a wager, as stated by the Chief Justice below, on one horse against the other. The only question is whether it is taken out of the operation of the general enactment by the proviso.

The meaning of this proviso has been considered in several cases in the English courts. In the case of *Batty v. Marriot* (*), where an agreement analogous to the present was made and money deposited to abide the event of a foot-race, it was held that a foot-race being a legal pastime, the agreement was within the proviso. This decision did not meet with entire acquiescence when it was brought before the courts in subsequent cases. It is unnecessary to refer to these cases, because the decision itself has been distinctly overruled by the Court of Appeal in the recent case of *Diggles v. Higgs* (*). In that case the agreement related to a walking match, and was to the same effect as that in the present action. It was decided that an agreement of this kind, being a contract of wager, was not an agreement, to subscribe or contribute for or towards any prize or sum of money within the true meaning of the proviso, which it was held applied to subscriptions and contributions other than wagers. It is not disputed by the two judges forming the majority in the court below that this decision was directly in point, but their own opinions not agreeing with it, they declined to follow its authority.

Their Lordships think the court in the colony might well have taken this decision as an authoritative construction of the statute. It is the judgment of the Court of Appeal, by which all the courts in England are bound, until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in colonies where a like enact-

(*) 5 C. B., 819.

(*) 2 Ex. D., 422; 21 Eng. R., 324.

ment has been passed by the Legislature, the colonial courts 345] should also govern themselves by it. *The judges of the Supreme Court, who differed from the Chief Justice, were evidently reluctant to depart from their own previous decision in a case of *Hogan v. Curtis* (*), but they might well have yielded to the high authority of the Court of Appeal which decided the case of *Diggle v. Higgs* (*), as the English court which decided *Batty v. Marriott* (*) would have felt bound to do if a similar case had again come before it.

Their Lordships would not have felt themselves justified in advising Her Majesty to depart from the decision in *Diggle v. Higgs* (*) unless they entertained a clear opinion that the construction it has given to the proviso in question was wrong, and had not settled the law; since in their view it is of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the courts should be as nearly as possible the same. Their Lordships, however, do not dissent from, nor do they desire to express any doubt as to the correctness of that decision, which, it may be assumed, has settled the vexed question of the construction of a not very intelligible enactment.

The case of *Diggle v. Higgs* (*) also decided that the statute does not preclude the party who has revoked the authority given to the stakeholder from recovering the money he had deposited; the Court of Appeal agreeing with a previous decision to the same effect of the Court of Queen's Bench in *Hampden v. Walsh* (*).

Their Lordships find that by the Colonial Act, 22 Vict. No. 18, s. 94, the Supreme Court is empowered, upon an appeal from a District Court, to order judgment to be entered for either party; and they are of opinion, the facts being undisputed, that the judgment, for the reasons above given, should have been entered for the plaintiff.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgment of the Supreme Court, and to direct that the nonsuit be set aside, and judgment entered for the plaintiff for the sum of £200.

The respondent must pay the costs of this appeal.

Solicitors for the appellant: *Young, Jones, Roberts & Hale.*

(*) 11 Sup. Ct.

12.

R., 524.

(*) 5 C. B., 819.

(*) 1 Q. B. D., 189; 16 Eng. R., 282

While at common law a wager made in respect to matters not affecting the feelings, interest or character of third persons, or the public peace or good morals, or public policy, is valid, and can be enforced; the tendency of the courts everywhere is to restrict rather than enlarge the rule: *Gridley v. Dorn*, 57 Cal., 78.

A wager upon the result of a horse-race is against good morals and sound public policy, and cannot be enforced by the courts: *Gridley v. Dorn*, 57 Cal., 78.

Book making on horse-races is another name for gambling, and all agreements concerning the same are void: *Haley v. Cridge*, 1 City Cts. R., 433; *Murphy v. Board Police*, 11 Abb. N. C., 840.

H. gave a check to a county agricultural society to pay the entrance fee, to enable him to enter his horse at an exhibition given by the society. The object was to enable him to have his horse entered to compete for the premiums offered by the society for trials of speed. Held, that the check was given for an illegal purpose, and no recovery could be had thereon: *Huger v. Boas*, 1 Harris, 601, followed; *Comly v. Hillegass*, 94 Penn. St. Rep., 132.

A wager as to whether an execution can be collected, cannot be considered as a wager upon any game within the meaning of the statute. But as between the original parties to such a transaction, a check given in payment is void, as being in contravention of sound policy: *Brughner v. Meyer*, 5 Col., 71.

A wager upon the result of a public election is void: *Willis v. Hoover*, 9 Oregon, 418; *Harper v. Crain*, 36 Ohio St. R., 338.

Money lent by one player to another, for the purposes of gaming, cannot be recovered, though it be admitted that the game was not an illegal game: *Ritchie v. Eckwyd*, 5 Wy., Webb & A.B. Vict. R. (Law), 98.

There is a distinction between an action in affirmance of an illegal contract, and where the action proceeds in disaffirmance of such contract. In the first case, such an action can in no instance be maintained, but in the latter, the authorities are in favor of recovering back money paid, where the contract is void as against public pol-

icy, if such contract has not been executed, and the plaintiff seeks to disaffirm his contract: *Willis v. Hoover*, 9 Oregon, 418.

Under the statute of New York, an action lies against the stakeholder, even though he have paid over the money to the winning party with the authority and consent of the depositor: *Mahony v. O'Callaghan*, 33 N. Y. Super. Ct. R., 461.

Where an illegal wager is made, the parties to it may, before the wager is decided, recover their stakes from each other or the stakeholder; but after the money has been lost and won and the result generally known, neither party should be heard in a court of justice: *Gridley v. Dorn*, 57 Cal., 78.

When money has been deposited as a wager, with the opposite party, it may be recovered back from him at any time before the event has happened upon which the wager was made; and against a stakeholder at any time before the money has been paid to the winner, either before or after the event has transpired, and even where the stakeholder paid the money over to the winner after notice not to do so: *Willis v. Hoover*, 9 Oregon, 418.

In the game of "poker," each party plays for himself. Therefore, under the gaming act of Missouri, if there be no conspiracy of two or more to cheat another player and no agreement to divide the winnings, a joint action cannot be maintained against them by the loser to recover the amount of his losses. The action lies only against the winner: *Lathem v. Agnew*, 70 Mo., 48.

A contract to speculate in margins, without any intention to deliver the article contracted for, but merely to pay the difference between the contract and market price, is illegal and void: Note by Mr. Wharton, 3 McCrary, 533; Mr. Stewart's note, 36 N. J. Eq., 49.

Canada, Lower: *Fenwick v. Ansell*, 5 Leg. News, 290; *Shaw v. Carter*, 26 L. C. Jur., 151.

Illinois: *Colderwood v. McCrea*, 11 Bradw., 543.

India: *Contra*, *Thackoorseydass v. Cupporchund*, 4 Moore's Ind. App., 339; *Pettambudass v. Thackoorseydass*, 5 id., 109; *Chotayloll v. Kaisreechund*, 6 id., 251.

Iowa: *Gregory v. Wattowa*, 78 Iowa, 713; *Melchert v. American*, etc., 3 McCrary, 521, 533 n., 11 Fed. Repr., 193.

Louisiana: *Succession of Condon*, 1 McGloin, 351.

Michigan: *Shaw v. Clark*, 49 Mich., 384.

Missouri: *Contra*, under statute of this State: *Third*, etc., *v. Harrison*, 3 McCrary, 316.

Wisconsin: *Everingham v. Meighan*, 55 Wisc., 354.

On the trial of a suit upon a promissory note, in which one of the defences was that the note was given for money due and owing upon a gambling contract, for the purchase of options on the board of trade, the court asked one of the plaintiffs, who was a witness in the case, if there was no understanding between him and the defendant that he was to furnish pork or grain, and whether the whole of the transaction, from beginning to end, was not merely to charge the defendant with the differences that might have grown out of the transactions: Held, that there was no special objection to the questions: *Kreigh v. Sherman*, 105 Ills., 49.

While the sale of goods, to be delivered at a future day, is valid, although the vendor neither has the goods in his possession nor has contracted for the purchase of them, nor has any expectation of acquiring them except by purchase at some time before the day of delivery; yet, if from the nature of the transaction and the circumstances attending it, whatever may be the form of the contract, it is apparent that the parties did not intend either a purchase or sale, or a delivery of the goods, but that, at the time appointed for delivery, the transaction should be closed upon the basis of the then market price, the losing party paying to the other the difference,—such a transaction is a wager, and is void at common law. In the absence of a statute pronouncing future contracts which are mere wagers illegal and void, the general rule is that where a party makes such contracts through a broker, for a commission only which is payable in any event, whether loss or gain result to the principal, such broker having no interest in the contracts, the principal is bound to reimburse the broker for advances made for him, if he subsequently execute his note or bill there-

for, or make an express promise to pay them, or if, with full knowledge of the facts and without objection, he permits the transaction to proceed. The statutes of this State (Code, § 2131,) pronounce all contracts founded in whole or in part on a gambling consideration, void; and under its operation negotiable instruments made upon a gaming consideration, or for a wager, are void, even in the hands of an innocent holder for value.

If a party employ a broker to make for him contracts for the future delivery of cotton, and gives to such broker his acceptance of a bill of exchange to be discounted and used in making such contracts; and if at the time it was his purpose, as was known to the broker, neither to actually buy nor sell cotton, nor to receive or deliver it, but simply to stake margins to cover differences in price, and on final settlement, merely to receive or pay the difference between the contract price and the market value price at the time fixed by the contract for delivery,—the consideration of the bill of exchange would represent a loan or advance of money to bet or stake as a wager on the future price of cotton: and if the contract further contemplates that the money is to be advanced and loaned in this State upon transactions to be made here, the bill of exchange would fall within the interdiction of the statute, and would be void in the hands of an innocent holder for value: *Hawley v. Bibb*, 69 Ala., 52.

When it is the intention of the parties to contracts for the sale of commodities that there shall be no delivery thereof, but that the transactions shall be adjusted and settled by the payment of differences, such contracts are void.

It is the duty of the courts to scrutinize very closely contracts for future delivery; and if the circumstances are such as to throw doubt upon the question of the intention of the parties, it is not too much to require a party claiming rights under such a contract to show, affirmatively, that it was made with actual view to the delivery and receipt of the commodity.

As the evidence in this case establishes the fact that the parties did not intend the actual delivery of the corn contracted for, but did intend to speculate upon the future market and to

settle the profit or loss of defendant upon the basis of the prices of grain on the 3d of May, 1881, as compared with the prices at which defendant contracted to sell, the contracts sued upon are void and plaintiff cannot recover: *Cobb v. Prell*, 15 Fed. Repr., 77, Cir. Ct. Kans.; 22 Am. L. Reg. (N.S.), 609, 612 note.

One who lends or advances money to be used for the purpose of making a corner in wheat, cannot recover it back by any legal measures: *Raymond v. Leavitt*, 46 Mich., 447.

A. directed B., a stockbroker, to sell on his account five hundred shares of stock "short." It did not appear whether A. owned the stock or not.

He gave no certificate to B., and arranged with him that there was to be no actual delivery of the stock between them, but that A. was to protect B. from loss if the market value of the stock advanced, and receive the difference in value from B. if it declined.

There was no agreement that B. should not make actual delivery of the stock he was instructed to sell. B. sold accordingly, and afterward the price rose. B. then borrowed from a fellow broker the necessary certificates to make delivery, and did deliver them, and received payment therefor through his clearing-house sheet. The price still rising, B. subsequently bought on A.'s order, five hundred like shares, to make good his loan, receiving them and paying for them also through his clearing-house sheet. He paid also to the lender the amount of an intermediate dividend on the stock. In an action by B. against A., to recover the amount expended for A.'s use in those transactions,—Held, that the facts disclosed stamped the transaction as a mere gambling contract between the plaintiff and the defendant, which was contrary to the policy of the law, and that therefore the former was not entitled to recover: *Dickson's Executor v. Thomas*, 97 Penn. St. R., 278.

When a person enters into stock gambling transactions through the medium of a broker, he will be deemed to be dealing with such broker as a principal and not as an agent.

Where a minor of limited means embarks in stock transactions to a large amount by way of margins, the court will, even in the absence of direct evi-

dence that he did not intend to receive or deliver the stock bought or sold on his behalf, infer that such was not his intent, and will therefore stamp the contract as a wagering contract merely, contrary to the policy of the law, and void *ab initio*. Where the whole amount deposited by the minor as margins is lost in such transactions, he is at liberty to recover back at any time, from the brokers employed by him, the amount so deposited.

The doctrine that where an infant has executed a contract and has enjoyed the benefit of it, and afterwards on coming of age seeks to avoid it, he must first restore the consideration which he has received, that he cannot have the benefit of the one side without restoring the equivalent on the other, may and certainly does apply in certain cases, but as a general rule is unsound.

It certainly has no application to the present case: *Buchizky v. DeHaven*, 97 Penn. St. R., 202.

The intent to wager may be implied, and circumstantial evidence is admissible to show its character. The courts are not bound, in these cases, by the form or expressions of the contract, nor by cotton exchange rules. The fact that the parties were in no condition to make or accept deliveries is competent: *Succession of Condon*, 1 McGloin (La.), 351.

In determining whether a contract is illegal, the entire contract on both sides will be considered, and if the consideration is illegal no part of it will be enforced. One part cannot be disregarded and the other enforced: *St. Louis, etc., v. Mathers*, 105 Ills., 257.

Where the question is whether the transaction is a *bona fide* sale or a speculation in margins, it is competent, in ascertaining the intention of the parties, to show how they were in the habit of dealing together in respect to like transactions prior to the one in controversy: *Colderwood v. McCrea*, 11 Bradw., 543; *Succession of Condon*, 1 McGloin (La.), 351.

No compromise by the parties of differences in respect to clearly illegal contracts and transactions can purge them and produce a valid claim: *Everingham v. Meighan*, 55 Wisc., 354.

See Mr. Stewart's note, 36 N. J. Eq., 49.

Except a negotiable promissory note transferred to an innocent *bona fide* holder: Third, etc., v. National, etc., 8 McCrary, 316; Shaw v. Clark, 49 Mich., 384; Brughner v. Meyer, 5 Col., 71.

If one makes a contract to deliver grain, or other produce, during a future month at a fixed price, unless there be an intent not to deliver it, but merely to speculate in margins and to pay the difference between the contract price and the market price, without a delivery of the article speculated in, the agreement is not invalid or illegal: Mr. Wharton's note, 8 McCrary, 533; Mr. Stewart's note, 36 N. J. Eq., 49.

Illinois: Colderwood v. McCrea, 11 Bradw., 543.

Iowa: Gregory v. Watt, 12 N. W. Repr., 726, 58 Iowa, 711; 4 Wisc. Leg. News, 378; Murray v. Ocheltree, 15 Cent. L. J., 434.

New Jersey: Baldwin v. Flagg, 36 N. J. Eq., 43.

New York: Knowlton v. Fitch, 53 N. Y., 288; White v. Smith, 54 id., 522. See Bigelow v. Benedict, 70 N. Y., 202.

United States, Circuit and District: Gilbert v. Granger, 8 Bissell (Ills. Dist.), 214.

A man, though not a dealer in wheat, may lawfully employ a broker on an exchange to sell wheat for him, for delivery at a future time, and to execute the contract for him by purchasing in the market the wheat for delivery when the time for delivery arrives, or by settling with the purchaser upon payment of the difference between the contract price, if the purchaser shall waive the execution of the contract by the delivery of the wheat according to its terms. To render such a contract unlawful, it must appear that there was a contemporaneous agreement that it should not be executed by delivery, but only by settlement of differences: Kent v. Miltenberger, 16 Cent. L. J., 433, 434, St. Louis, Ct. Appeals.

When contracts are valid according to their terms, the burthen is on defendant to show by extrinsic evidence its invalidity: Kent v. Miltenberger, 16 Cent. L. J., 433, St. Louis Ct. Appeals.

As to when a security to a broker for difference on margins may be enforced

and when not, see Mr. Stewart's note, 36 N. J. Eq., 49-51.

The plaintiffs, as brokers, having made for defendant lawful contracts, as his agents, which contracts they, as his agents, executed and discharged in a lawful manner, in consequence of all which defendant incurred an indebtedness to plaintiffs, he cannot avoid his liability to plaintiffs by setting up that his intention in making the contract was to bet upon the future price of grain, and not to buy, and that plaintiffs knew this: Kent v. Miltenberger, 16 Cent. L. J., 433, St. Louis, Ct. App.

Brokers, under the rules of the exchange in which the dealings were had, were not bound to settle upon the basis of a fictitious and manipulated market, and can charge against their principal only the losses which they sustained by settling in the average market for the purposes of consumption; and it is a part of their case to show what the market price of the wheat, at the time of the delivery, was in a fair market: Kent v. Miltenberger, 16 Cent. L. J., 433, St. Louis, Ct. App.

Courts of law will not assist a person to recover property which has been lent, given, or delivered by him for an illegal purpose.

Victoria: Cane v. Levy, 3 Victorian R. (Law), 193.

Where property is conveyed to trustees in trust for the benefit of a railroad company, under a contract which is contrary to public policy and illegal, i.e., not to establish any station or depot within three miles of a certain place on its road, a court of equity will not aid either party in any efforts he may make to reap the benefits which may flow from such illegal contract.

If the trustee reconvey to the grantor, the railway company has no remedy even for taxes it has paid on the lots: St. Louis, etc., v. Mathers, 105 Ill., 257.

Foreign insurance companies, doing business in Pennsylvania without having complied with the provisions of the statute relating to such companies, cannot set up their turpitude to defeat actions on their contracts brought by innocent persons. The statute does not impose upon the insured the duty of seeing that the insurer and his agents have complied with the statu-

tory requirements: *Swan v. Watertown, etc.*, 96 Penn. St. R., 37.

The maker of a non-negotiable note, discounted with a national bank, cannot question the right of the bank to recover on it, on the ground that national banks have no right to deal in that kind of paper: *National Bank v. Gillian*, 72 Mo., 77.

So a mortgage given to a national bank: *Oldham v. First, etc.*, 85 N. C., 240.

Where the statute law of another state enters into an agreement, it will, if not against public policy, be enforced in a sister state: *Bancher v. Gregory*, 9 Mo. App. R., 102.

Plaintiff's intestate holding certain notes of the defendant put them in a box and placed them in defendant's keeping (the latter not knowing the contents), his object being that he might swear that he had no property, and thus evade the payment of an obligation to another person. Held, plaintiff was entitled to recover the property: *Mallett v. Swain*, 56 Cal., 171.

Where a loan of money is to be secured by a conveyance of real estate in fee to the lender, with a lease back for a specified number of years, with a privilege of redemption to the lessees at the expiration of the term, the lessees to pay a ground rent equal to eight per cent. per annum on the money loaned, such security is in equity a mortgage and subject to taxation under the statute; and a promise to a third person to pay for services to be rendered in obtaining a loan to be thus secured, is not void as being contrary to public policy, although the object of the lender of the money in adopting such form of security was to evade taxation upon the investment: *Patrick v. Littell*, 36 Ohio St. R., 79.

This action was brought to foreclose a mortgage given by one Wood to Charles F. Nichols, as collateral to a bond for \$7,000, which bond provided that the money was to be received by him in trust for Elizabeth B. Nichols, Mary E. Ball, and George C. Nichols. Two thousand seven hundred dollars of the \$7,000 belonged to Elizabeth, \$3,300 to Mary, and \$1,000 to George. The bond and mortgage were taken in the name of Charles, because Elizabeth and Mary were unwilling to have it taken in the name of George (as he

was a stockholder in a company and liable as such on certain of its guarantees), and in order to protect the property of the three persons from any contingent liabilities thereon. Another reason for so taking it, was the unwillingness of George C. to have his name appear, lest it might subject him to a taxation which he considered unjust. The mortgagor made no defence. A subsequent incumbrancer, by attachment and judgment against the mortgagor, claimed that the mortgage was void because it was intended to hinder, delay and defraud the creditors of George, and for the reason that it was against public policy, as being an attempt to escape taxation.

Held, that neither of these defences could be set up by a subsequent incumbrancer after the mortgagor had waived them by making a default.

Quere, as to whether even the mortgagor could have availed himself of them? *Nichols v. Weed, etc.*, 27 Hun, 200.

In an action against the maker of a promissory note given as the consideration of a conveyance received for the purpose of aiding the grantor to delay his creditors, the fraud cannot be set up in defence: *Butler v. Moore*, 73 Maine, 151.

The violation of the marriage obligations by a married woman by committing adultery, and becoming pregnant by one not her husband, under an alleged promise of marriage, cannot be made the foundation for a consideration to support a promise by her seducer to make a will giving her and the child all his property, and a court of equity will not specifically enforce such an agreement, even if such an agreement, founded on a proper consideration, is enforceable: *Drennan v. Douglas*, 102 Ills., 341.

An agreement in consideration of future illicit cohabitation between a man and a woman is void, and past cohabitation does not form an adequate consideration for a promise not under seal, even if it does when made under seal.

A promise by a putative father to support his illegitimate child, may be supported and sanctioned from his legal liability for such support, but there being no legal liability to make such child an heir, a promise or

agreement to do so, made with the mother, must have a valuable consideration for its support. In such case the surrender of the child, by the mother to the father, to be provided for, being beneficial to the mother rather than detrimental, and an inconvenience to the father, does not constitute a valuable consideration for an agreement of the father to make the child his heir-at-law: *Wallace v. Rappley*, 108 Ills., 229.

A complaint by a woman for her own seduction, which shows by its averments that she was induced to yield her person to the defendant by the promise of a pecuniary consideration which he has refused to perform, such contract being immoral and vicious, is against public policy and void, is bad on demurrer: *Wilson v. Ensworth*, 85 Ind., 399.

A contract to marry would be different and constitute a sufficient inducement and legal contract: *Wilson v. Ensworth*, 85 Ind., 405; *Kenyon v. People*, 26 N. Y., 203; *Kurtz v. Frank*, 76 Ind., 594.

A promise to marry a woman by one having connection with her, that if he get her with child he will marry her, is legal: *Hotchkins v. Hode*, 38 Barb., 117; *Wells v. Padgett*, 8 id., 325; *Kniffen v. McConnell*, 30 N. Y., 285.

See *Whitney v. Elmer*, 60 Barb., 250, 262; 1 Bish. Mar. and Div., §§ 263-5; *Callahan v. State*, 63 Ind., 199, 202; *Steinfeld v. Levy*, 16 Abb. (N.S.), 26.

Scrip in a mining company was lent to a person to enable him to vote at a meeting of the company. Held, that the scrip having been lent for an illegal purpose, could not be recovered: *Cane v. Levey*, 3 Victorian Rep. (Law), 198.

N. entered into a verbal contract with D., a director and the president of a national bank, to buy of the latter 114 shares of stock in the bank at \$140 per share, upon the condition that he should be made cashier of the bank. Afterward D. notified N. that he could not, and would not, comply with the contract. Thereupon N. brought his action to recover damages for the breach thereof. Held, the consideration of the contract being against public policy, the contract was void, and N. was not entitled to recover damages: *Noel v. Drake*, 28 Kans., 265.

A contract between two stockholders in a corporation, by the terms of which one, in consideration of a sum of money paid to him by the other, agrees to vote for a certain person as manager of the corporation, and also to vote to increase the salaries of the officers of the corporation, including that of the manager, is void as against public policy, unless it is assented to by all the stockholders of the corporation; and whether it is valid if so assented to, *quære*: *Woodruff v. Wentworth*, 133 Mass., 309.

The property owners along a certain street in the city of Chicago, having in contemplation the paving of the street, were negotiating with a paving contractor on that subject, and some of the owners had signed a contract with such contractor for the doing of the work. Pending these negotiations a second and rival paving contractor sought to obtain the contract for himself, soliciting the owners for that purpose. Finally the rival contractors compromised their respective interests in the matter by the withdrawal of the one first mentioned, and the agreement on his part to aid in securing the contract for his rival, the latter agreeing to pay to the former a certain sum out of the profits expected to be realized for the work. This arrangement was consummated to the extent that the one who was to have the contract, under the arrangement between the two rival contractors, did secure it from the property owners. That was brought about in this way: the contractor who withdrew from the contest, to obtain the contract for the doing of the work, urged those of the owners who had signed the agreement with him to transfer their names to the other contract, and at a meeting of the committee of the property owners to consider and determine upon the matter, he wrote out a bid for the work for himself and a lower bid for the other contractor according to the arrangement beforehand. In an action to recover upon the agreement made by the contractor who secured the contract to do the work, to pay to the other a certain sum out of the profits of the job; it was held, that the agreement sued upon, taken in connection with its consideration, was against public policy, and a fraud upon the persons who were to pay for the improvement of the street, and therefore

formed no valid foundation for the action: *Ray v. MacKin*, 100 Ills., 246.

Defendant, upon receiving his appointment as the attorney of a telegraph company, agreed that if the plaintiff who is also an attorney would assist him in the litigations pending against the company, he would by way of recompense divide the salary of the office. Held, that as between the parties the agreement was valid, and that it neither offended public policy or good morals: *White v. Polhamus*, 1 City Courts Rep., 421.

A candidate for office cannot be held liable on his promise to pay a certain sum towards meeting the expenses of a political organization in enrolling voters, for room rent, etc. Such promise having its support upon illegal expenditures cannot be enforced: *Foley v. Spier*, 21 Daily Reg., 937, affirmed 16 N. Y. Weekly Dig., 171.

A contract made in Ohio prior to a nominating convention and an election, which was in substance, that if the plaintiff would support the defendant for nomination and election to the office of auditor of Henry county, Ohio, the defendant would, if nominated and elected to such office, employ the plaintiff as his deputy during the term of such office, is illegal and void, being in contravention of public policy. A contract made in Ohio, after the defendant had been both nominated and elected to the office of auditor of Henry county, Ohio, which was in substance that the defendant would employ the plaintiff as his deputy for the term of three years, and during his term of office, and would pay to the plaintiff, for his services, one half of the net salary and fees of the office, is not necessarily illegal or void.

The two contracts above mentioned not appearing to have any necessary connection with each other, and it not appearing that the second is founded upon the first, held, that the first will not necessarily render the second illegal or void: *Stout v. Ennis*, 28 Kans., 706.

By statute of this State, imposing penalties for violation of election laws, it is a misdemeanor for any candidate for an elective office, with intent to promote his election, or for any other

person in his behalf, to furnish entertainment or money to procure or compensate voters, or to contribute money for any other purpose intended to promote an election of any particular person or ticket (1 R. S. [6th ed.], 452, § 6), except for defraying the expenses of printing, and the circulation of votes, handbills and other papers previous to any such election, or for conveying sick, poor or infirm electors to the polls. In an action to recover compensation for making certain speeches in the state of Indiana, under an alleged employment by defendant, the defendant set up, as a defence in his answer, that "the alleged contract was and is against the policy of the common law, repugnant to the constitution and laws of the United States, against public policy and void. On demurrer to this defence:

Held, that no authority had been found to show that it is an offence at common law for a candidate for a national office, who could not personally present his individual views of national policy over a wide area of constituency, to employ and compensate a person for that purpose.

Held, further, that the pleadings not showing when the alleged contract was made, but all agreeing that it was to be fully performed in the State of Indiana, and there being no averment in the answer that the alleged contract is void by the law of that State, that fact cannot be assumed, and the penal statutes of this State have no extra territorial jurisdiction: *Murphy v. English*, 64 How. Pr. Rep., 362, 5 Month. L. Bull., 35.

The consideration of a contract must be not only valuable but lawful; hence there can be no recovery by one for his time and services, the purpose and tendency of whose employment was to obstruct the administration of justice, by influencing state witnesses and by inducing the state's attorney to hold back in the discharge of his official duty, in prosecuting the defendant charged with adultery: *Barron v. Tucker*, 53 Verm., 338.

An action will not lie to recover for lobby services. To authorize a recovery for services to procure the passage of a statute, it must clearly appear that the acts performed were such as the

law will sanction in aiding and promoting legislative action: *Harris v. Simonson*, 28 Hun, 318.

An agreement by which a physician, as a consideration for the purchase from him of a drug and prescription business, contracts to send thereafter all prescriptions of his practice to the buyer to be filled, is not unlawful, and an action will lie to recover damages for its breach.

An allegation of a breach of such agreement in substantially the words of the promise, is sufficient; the necessary implication therefrom being the existence of patients, and a wilful or negligent omission to direct or recommend them to plaintiff: *Ward v. Hogan*, 11 Abb. New Cases, 478.

An agreement made by a borrower who is the proprietor of a lager beer garden, to buy all the beer used by him at such garden from the lender, who is a lager beer brewer, until the loan shall be paid, provided the lender will furnish such beer at the fair market price, is not usurious, and is not in restraint of trade: *Ebling v. Bauer*, 17 N. Y. Weekly Dig., 497, 30 Hun, 382.

As to when an agreement is and when it is not void on account of an agreement or understanding that parties shall not bid against each other at a public sale, see *Corning v. Pond*, 29 Hun, 129, 186; *Doolin v. Ward*, 6 Johns., 194; *Wilbur v. How.*, 8 id., 444; *Thompson v. Davies*, 13 id., 112.

An agreement between two tenants in common of certain real property, whereby, in consideration of a certain sum, one tenant was to procure the foreclosure of a mortgage on the common property, and at the foreclosure sale was to refrain from bidding upon the property, and was to allow the other tenant to purchase his interest without competition from him is not, as between the two tenants in common, void as against public policy, for the reason that the consideration was a forbearance to bid at a public sale under a judicial decree: *McKenna v. Bolger*, 17 N. Y. Weekly Dig., 431, 30 Hun, 384.

The court will enforce an agreement between several persons in the same trade for the purpose of dividing the profits of all business obtained by any of them, so as to avoid competition: *Collins v. Robbins*, 5 Wyatt, Webb & A'B. (Eq.), 104.

There is nothing either in law or morals to prevent parties from uniting together, in good faith, to purchase property, whether it is offered at public auction or advertised for sale and bids from purchasers are invited: *Smith v. Ullman*, 58 Md., 183; *Hunt v. Elliot*, 80 Ind., 245.

Defendant executed an instrument, whereby he agreed that if plaintiff withdrew from a contemplated purchase of goods, waived his opportunity and did not buy them, that he, the defendant, would in case he bought them pay plaintiff \$75. Held, that it was a valid contract, that the rule making void agreements not to compete at a public sale had no application: *McCallum v. Grossman*, 1 City Courts Rep., 423.

An agreement with an attorney at law to do what can legally be done to obtain from the governor a pardon or commutation of sentence of a person convicted of a crime, is not unlawful and the attorney can recover for services rendered thereunder.

"A distinction should be made between an employment of this kind and a contract to procure a pardon made by a person who is not an attorney, which latter contract is illegal: 4 N. Y., 457; 7 Watts, 152. Such a contract would be objectionable, because it would appear on its face that the means to be employed were influence or personal solicitation or some others equally objectionable, while in this case the employment is to perform services in the line of the employe's profession, which for any other object would be unobjectionable." *Bremsen v. Engler*, 16 N. Y. Weekly Dig., 559, Superior Court.

As to the legality of contracts between competing lines of railways to pool the receipts of their business, see 16 West Jur., 329.

If plaintiff's act was induced by duress on the part of defendant, plaintiff may recover notwithstanding each of them intended the compounding of a felony, or the stifling of a prosecution of the act: *Haynes v. Rudd*, 17 N. Y. Weekly Dig., 482, 30 Hun, 237.

The duress which will enable one to avoid his contract and recover money paid, must be threats or actual violence: *Buchanan v. Sahlien*, 9 Mo. App., 553.

Mere vexation and annoyance leading to the execution and acknowledgment

of a conveyance of land in trust for the grantor and his heirs, is not sufficient to establish such duress or to avoid the deed, unless it be further shown that the grantor's mind was in that condition that by reason of such vexation and annoyance a state of insanity was produced which existed at the time of the execution and acknowledgment: *Brower v. Callendar*, 105 Ills., 88.

Mere angry or profane words, or strong and earnest language, will not constitute such duress as will relieve a party from his contract; for duress by threats, which will avoid a contract, only exists where such threats excite, or may reasonably excite, a fear of some grievous wrong, as bodily injury or unlawful imprisonment: *Adams v. Stringer*, 78 Ind., 175.

Refusal to perform a contract, and the exaction of a higher price is not legal duress: *Goebel v. Alexander*, 47 Mich., 489.

An appeal bond, instead of following the statutory requirement, "that the appellant shall prosecute his appeal to effect, and if he fail to make his plea good, shall answer all damages and costs," superadded the words "that he shall pay for the use and detention of the property covered by the mortgage in controversy during the pendency of the appeal." In an action on the bond, held (distinguishing from those in which official bonds, and bonds given to the government for the purpose of enjoining some office or privilege, have been sustained as contracts at common law), that these words must be rejected, and the bond construed as having its proper and ordinary legal effect, the judge taking it having no right to exact such an addition to the condition of an appeal and supersedeas: *Kountze v. Omaha*, etc., 107 U. S. R., 378.

Threats to withhold the payment of a debt, or to refuse the performance of a contract, or to do an injury which may at once be redressed by legal process is not duress: *Tucker v. State*, 72 Ind., 242.

Money paid to prevent the exposure of the payer's conduct, whether criminal or otherwise, cannot be recovered in equity: *Hoyt v. Dewey*, 50 Verm., 465.

It is no defence to a note made payable to an attorney of the owner, that the attorney *falsely* represented that his

client had a cause of action against the maker for criminal intimacy with the client's wife, and had papers in the hands of an attorney at Piqua, Ohio, to begin suit for \$20,000, unless a compromise could be made, etc. The defendant being necessarily cognizant of the facts, had no right to be influenced by such representations.

It is a good defence to a suit on a note given in settlement of damages claimed for criminal intimacy with the wife of the payee, that as a part of the settlement the parties agreed in writing that the note should be void if the payee should ever speak of such intimacy, and that he had broken this agreement: *Wells v. Sutton*, 85 Ind., 70.

A peddler was informed that he would not be allowed to sell oil in the town of Dartmouth without a license, and, rather than stop his business or contest the right, he paid the fee.

The county judge held that the money having been paid voluntarily, could not be recovered.

Held, reversing this judgment, that the money could be recovered back under the count for money had and received: *Hancock v. Town of Dartmouth*, 2 Nova Scotia L. R., 129.

Money paid or property conveyed under duress, or upon fraudulent inducement, may be recovered in equity. Thus, H., who had long been on terms of friendly intimacy with D., a female neighbor, made an assault on her in her own house, with intent to ravish. He had already on several occasions passed the limits of conventional propriety in his intercourse with her, inviting her by act and innuendo to an adulterous intercourse with him, and, several weeks before the time in question, had made a like assault upon her. There was no apparent change in the intimacy existing between them down to the time of the second assault, which was made at a meeting to which D. had agreed in the expectation that H. would assail her chastity, and that, under the observation of a person whom she had admitted into an adjoining apartment as a witness, according to pre-arrangement. Immediately after the second assault, D., appearing to be in great distress of mind, summoned B., her brother, who, acting in his sister's behalf, invited H. to an interview, and there charged him with

an attempt to outrage his sister's person, and told him that she proposed to pursue him with such appliances as the law would afford, unless he gave her a large sum of money in compensation. The following day H. paid a sum of money and conveyed property to B., for the use of D. H. filed a bill against D. and B., to recover the money and property :

Held, that as the distress of D. was feigned, the money and property were procured by both fraud and duress, and that defendants should repay and reconvey the same: *Hoyt v. Dewey*, 50 Verm., 465.

As to law of duress, see 15 Cent. L. J., 262; 1 Kentucky Law Repr., 187; 32 N. J. Eq., 51 note; 20 Amer. L. Reg. (N.S.), 665 note; 21 id., 115; 23 id., 190.

As to duress *per minas*, that is restricted to fear of loss of life, or of remediless injury to the person, or of imprisonment: *Co. Lit.*, 253b; 2 Inst., 483. But duress by threats of imprisonment must be such as to excite a reasonable fear of immediate imprisonment. We do not think that a threat of prosecution addressed to a man conscious of innocence, is such a threat as would induce in any man of ordinary firmness an overwhelming fear of immediate imprisonment. Had the proper preliminary steps been taken, an affidavit been made before a magistrate or an information been filed, or had process issued, the case might be different. But we are not aware of any case in which threats of imprisonment have been held to constitute duress, where the threat was not accompanied at least with the statement that the prosecution had been begun, and that the parties had thus the means immediately at hand of procuring the instant arrest and imprisonment of the person threatened: *Harman v. Harman*, 61 Me., 227.

Nor is fear of imprisonment alleged distinctly in the petition. Fear of disgrace, and of prosecution, and of public exposure is alleged, but not fear of immediate imprisonment.

An attempt to collect a private claim by a resort to a criminal proceeding is undoubtedly specially odious, and the compounding of a felony is a crime against society; but it does not therefore follow that a threat of criminal

proceedings constitutes duress *per minas*. An arrest by legal warrant on a criminal charge to compel satisfaction of a debt may also be a misuse of process, and an illegal arrest, as respects the person, knowingly perverting the machinery of the law to his private end; but we do not see that that helps the matter at all. In the present case there was no arrest.

It is also true that circumstances of extreme necessity and distress, though not presenting a case of legal duress, may so overcome free agency, in some particular instance, as to justify a court of equity in setting aside a contract made under such circumstances, on account of the fraud practised upon one who has been morally chained down and deprived of the full exercise of his faculties of mind and will: *Buchanan v. Sahlein*, 9 Mo. App., 558, 559.

To constitute duress, an imprisonment must be tortious and without lawful authority, or by an abuse of lawful authority: *McDonald v. Carlton*, 1 New Mexico, 172; *Heaps v. Dunham*, 95 Ills., 584; *Kneeshaw v. Collier*, 30 U. C. Com. Pl., 265; *Compton v. Bunker*, 96 Ills., 301.

Threats of a lawful prosecution purposely resorted to for the purpose of overcoming the will of the party threatened, by intimidating or terrifying him, amount to such duress as will avoid a contract thereby obtained: *Haynes v. Rudd*, 17 N. Y. Weekly Dig., 482, 30 Hun 237.

Imprisonment under regular and lawful process upon probable cause and without malice, does not constitute duress so as to invalidate a contract entered into by the prisoner to procure his freedom, unless he has been induced thereto by unlawful force or privation: *McDonald v. Carlton*, 1 New Mexico, 172.

A gold refiner, on being accused, confessed that he had taken gold intrusted to him by his employers to refine. While under arrest at the police station, he agreed to make restitution by giving a mortgage on his lands for the amount which he admitted he had taken, and accordingly gave such mortgage, which was drawn by a lawyer and duly acknowledged by him and his wife.

He was afterwards indicted for the offence, pleaded guilty and was sen-

tenced. On foreclosure, held, that the mortgage was not void on the ground of duress: *Smillis v. Smith*, 32 N. J. Eq., 51.

If an agreement of settlement be procured by threats of criminal prosecution it may be avoided, but a threat of legal process, even including arrest and imprisonment, is not sufficient to constitute duress: *Dunham v. Griswold*, 16 N. Y. Weekly Dig., 501; S.C., mem. 29 Hun, 277.

The plaintiff being indebted to the defendant in the sum of \$71, for two notes, which had been forged by the plaintiff and transferred to the defendant, it was agreed that a wagon belonging to the plaintiff, and then in possession of the defendant, should be exposed for sale at public auction, and that the plaintiff should not forbid the sale, and the defendant agreed in consideration thereof, to surrender the notes. The wagon was accordingly sold and purchased by the defendant, who surrendered the notes to the plaintiff, by whom they were destroyed. At the time of the making of the agreement the plaintiff was not in custody, nor was he threatened with an illegal arrest.

Held, that an action by the plaintiff to recover the value of the wagon, on the ground that the agreement was procured by threats, and was made to compromise a felony, could not be maintained: *Kissock v. House*, 23 Hun, 35.

A contract of re-enlistment voluntarily entered into by a soldier while under lawful arrest for a military offence, through the friendly counsel of his guards, but without any request or solicitation of the enlisting officer, though upon his promise that the charge pending will be dismissed if the soldier's future conduct is good, is not invalid for duress: *McDonald v. Carlton*, 1 New Mexico, 172.

Where one is convicted of a felony and sentenced to an imprisonment by separate and solitary confinement at labor, there is nothing in the act of 1820 (Purd. 1185, pl. 10), to prevent him from voluntarily executing a release for money due from him. There is no duress when a convict asks his guardian to pay over to him his money, on his executing a release to the said guardian: *Matter of Buzzard*, 13 Lanc. Bar., 127.

Where a party seeks to be relieved from the obligation of a contract on the ground of duress *per minas*, regard will be had to age, sex, and condition of life, and if the threats employed were such as were calculated to deprive one individually of his freedom of will, he will be relieved from liability, even though they were not of such a character as would produce a like effect on a firm and courageous man.

In such case, evidence is sometimes admissible to show that the person subjected to duress had heard that the person using the threats was of a violent disposition, for this may be a circumstance which, among others, led to the execution of the contract: *Jordan v. Elliot*, 12 Weekly Notes of Cases, 56; S. C., 39 Leg. Int., 320; 22 Amer. L. Reg. (N.S.), 180.

Where a person had been arrested on charge of bastardy, under a warrant regularly issued, and while under arrest but not actually in prison, or even under such restraint as would prevent him from going where he pleased, he executed his promissory note in settlement of the subject-matter of the charge; it was held that he was under no such duress as would enable him to avoid the contract: *Heaps v. Dunham*, 95 Ills., 584.

A stipulation not to sue, signed by a person under compulsion, while restrained of his liberty under a process illegally issued, upon being told by the deputy sheriff that unless he signed he would have to stay in jail a long time, is void for duress: *Guillaume v. Rowe*, 63 How. Pr., 175.

Where the evidence shows the conveyance was an intelligent, voluntary act, the facts that the deed was executed reluctantly, and after some threats had been made, are insufficient to establish undue influence or duress: *Hamilton v. Smith*, 57 Iowa, 15.

Where one alleges that a contract should be avoided on the ground that it was made to compound a felony, it must be shown that there was an agreement not to prosecute, and it must appear by a preponderance of evidence that a crime was actually committed.

Threats of prosecution, unless a certain security was given, will not justify an inference that if the security was given, the agreement was that no prosecution would follow: *Swope v.*

Jefferson Fire Ins. Co., 98 Penn. St. R., 251.

A contract will not be declared void and the cause be reversed, on the ground that the only consideration therefor was the compromise of a felony, where it does not clearly appear from the evidence whether the consideration for the contract was a forbearance to prosecute criminally, or in a civil action for damages: *Malli v. Willett*, 57 Iowa, 705.

The defendant C. being in prison in due course of law on a charge of assaulting the plaintiff, for which an indictment was laid against him charging him with an assault occasioning actual bodily harm, and with common assault, and a civil action for the assault having also been brought against him, a settlement was effected by defendant C. giving a note indorsed by defendant B. for \$1,000 for the damages sustained by plaintiff, which was held not to be disproportionate to the injury sustained, and a fine was inflicted for common assault merely, the former charge in the indictment being withdrawn. The settlement was made, and the note accepted by plaintiff at defendant's instance, and under the sanction and advice of his counsel; without plaintiff having urged it or taken advantage of the imprisonment to procure it, and the judge, in sentencing the defendant, forbore to imprison because defendant had made compensation to the plaintiff. To an action on the note, the defendants set up fraud, duress and illegality of consideration. Held, that the plaintiff was entitled to recover; that there was no evidence of fraud; nor, under the circumstances, could there be deemed to be duress; and further, that there was no illegality of consideration, for the settlement was merely of the plaintiff's private damage, and in no way affected the public interest, the law having been vindicated by the imposition of substantial punishment: *Kneeshaw v. Collier*, 30 U. C. Com. Pl., 205.

It is competent for a person charged with bastardy to compromise the matter with the woman alleged to have become pregnant, and if the party so charged, upon being arrested under a warrant issued in such proceeding, shall enter upon a settlement, not in-

duced by fraud or oppression, and shall give his promissory note for the benefit of the alleged injured party, such settlement will be conclusive upon the person charged, in respect to the question whether the woman was, in fact, pregnant or not: *Heaps v. Dunham*, 95 Ills., 584.

A promise of marriage, freely made, is not nullified by another made under duress: *McCrum v. Hildebrand*, 85 Ind., 204.

A person who had received a reward for finding a sum of money, repaid it, after he had pleaded guilty to a violation of the general statutes, ch. 79, § 1, and had been told by the magistrate, before whom the hearing on the complaint was had, that the law required him to return the money. Held, in an action by him for money had and received, that his arrest was legal, and that the evidence would warrant a finding that the money was repaid by him voluntarily and not under duress: *Felton v. Gregory*, 130 Mass., 176.

A willing mind on the part of the wife is requisite to the validity of a deed made by her. To avoid the deed of the wife on account of threats of the husband, it is not necessary that they should put the wife in fear of physical injury. If he threatens an abandonment of her if she refuses to sign a deed conveying the homestead, and she, having reasonable apprehension that he would carry out his threat, signs the deed, this will be sufficient to avoid it: *Kocourek v. Marah*, 54 Texas, 201.

In order to authorize a court to declare a wife's conveyance invalid on the ground that its execution was procured by duress of her husband, the evidence of duress should be strong and clear. If declarations made by the husband to the wife are relied upon to prove such duress, they should be of such a character as to establish, beyond any question, that she acted under an apprehension of personal injury or grievous wrong. Held, accordingly, that threats made by a husband to his wife some time prior to her signing a deed by which her inchoate right of dower was conveyed to a third person, that if she did not sign the deed she should not live with him in peace, were not sufficient to invalidate her deed *Rexford v. Rexford*, 7 Lans., 6.

A mortgage executed by a wife on her separate property to secure the separate debt of her husband, under threat by him to abandon her if she do not, may be avoided by her on the ground of duress, if the mortgagee be aware of such threat at the time of the execution of the mortgage: *Lime v. Blizzard*, 70 Ind., 23.

A mortgage executed by the wife to secure a debt of the husband, under the inducements of false and fraudulent charges of embezzlement against the husband and threats to institute criminal proceedings against him, is void.

The fact that the mortgaged property was purchased by the husband with the money of the party making the threats, and fraudulently conveyed to the wife, would have no tendency to show the mortgage valid: *The Singer Manufacturing Co. v. Rawson*, 50 Iowa, 634.

Where a wife executed and acknowledged a deed conveying her land to a bank whose money her husband had embezzled to a large amount, to save him from arrest and criminal prosecution, and it appeared that the wife was urged to make the conveyance by her husband and brother, who informed her that if she would do so the bank would not prosecute, and the bank had no knowledge of any such representation being made to induce the execution of the deed, nor authorized any to be made, and none of its officers had any conversation with the grantor on the subject: Held, that a court of equity would not set aside the deed for fraud, duress or imposition: *Compton v. Bunker Hill, etc.*, 96 Ills., 301; *Lefebvre v. Dutruit*, 51 Wisc., 326.

The fact that a woman is induced to act by representations that such action is all that will save her son from State prison, or by threats on his part to commit suicide, does not in a legal sense constitute duress: *Metropolitan, etc., v. Meeker*, 85 N. Y., 614.

A threat of suicide made by a husband to his wife to induce her to sign a promissory note does not amount to duress, and cannot be set up by her as a defence to an action upon the note: *Remington v. Wright*, 43 N. J. L., 451.

It is not competent to show fraud or duress on the part of the husband, in procuring from his wife a warranty

deed, under which her grantee is a *bona fide* holder of the title, without proof of the complicity of such grantee in such fraud or duress: *Reed v. Reed*, 71 Maine, 156.

If a woman on the eve of her marriage is induced by threats of the imprisonment of her intended husband, and by undue influence and fear that her marriage will otherwise be prevented, to sign an agreement to pay the debts of her intended husband, the agreement cannot be enforced in equity; and a part payment by her after signing the agreement, on legal proceedings being threatened and in ignorance of her rights, is not in equity a ratification of the agreement.

If a woman, induced by undue influence, signs an agreement to pay a debt of her intended husband, the fact that the creditor forbore to sue the original debt and to arrest the debtor and that the woman thereby obtained a husband and a title, will not prevent the woman from setting up the defence of undue influence when the creditor seeks to enforce the contract in equity: *Rau v. Von Zedlitz*, 132 Mass., 164.

G., who was treasurer of a town, became a defaulter. One of the selectmen of the town applied to G.'s maiden aunt, to whom he was a stranger, and after referring to the defalcation, of which she had just before been informed, stated that her nephew had exposed himself to a criminal prosecution and imprisonment in the State prison; and that, unless she immediately secured the town against loss, criminal proceedings would on that day be instituted. The aunt was an elderly woman, feeble in body, of an excitable temperament, wholly without business experience or self reliance, and was greatly attached to her nephew, having lived in the same home with him from his birth. She was greatly agitated and expressed herself as willing to do anything to save her nephew from the State prison. The selectman left her in this state of mind and half an hour after returned with a lawyer, who drew a mortgage of certain real estate which she owned, which she signed without deliberation or asking advice of her friends and in the belief that the town would at once procure the prosecution of her nephew, if she did not, and solely to save him from such pun-

ishment. Upon a bill for a foreclosure of the mortgage brought by the town, it was held—

1. That a court of equity would refuse to enforce a contract of suretyship entered into under such circumstances.

2. That it did not alter the case that the selectman believed that G. was liable to a criminal prosecution and punishment in the State prison: *Town of Sharon v. Gager*, 46 Conn., 189.

Agreements founded on the suppression of criminal prosecution are void, as they have a manifest tendency to subvert public justice. Stifling a prosecution of forgery comes within the rule that where the welfare of society and the vindication of the law are the chief objects, the defendant may give in evidence the illegality of the contract as a bar to a suit to enforce it; and this to prevent the evil which would be produced by enforcing the contract or allowing it to stand. A judgment confessed by warrant of attorney, in consideration of stifling a prosecution for forgery is void, and it was error for the court to refuse to open such judgment and permit the defendants to show the illegal consideration, although they were parties thereto: *Bredin's Appeal*, 92 Penn. St. R., 241.

A promissory note is void, where the consideration therefor is the promise of the payee that he will refrain from prosecuting one for a crime or in settlement of a crime: *National, etc., v. Kirk*, 90 Penn. St. R., 49; *Heaps v. Dunham*, 95 Ills., 584.

The fact that money was stolen, is a valid consideration for a promise on the part of the thief to repay it. But it is otherwise where an agreement to prevent or obstruct a prosecution for the crime enters into the consideration: *Von Winsch v. Klaus*, 46 Conn. 433.

A contract conditioned for the execution and deposit of certain promissory notes by one under sentence for the commission of a crime, to be delivered to the prosecuting witness upon certain conditions, one of which was that the maker should receive a pardon, or be acquitted on a re-trial, is illegal and void as against public policy: *Haines v. Lewis*, 54 Iowa, 301.

One may take a note from another for what he owes him, though for money embezzled; but if he procure the note to be executed upon an agree-

ment not to prosecute him for the embezzlement, the contract will be illegal and void: *Martin v. Tucker*, 35 Ark., 279.

Where a person has voluntarily, i. e., without the coercion of force or threats, given his promissory note to compound a crime, and has been compelled to pay the same, it having been transferred to a *bona fide* holder for value before maturity, he cannot maintain an action against the one to whom the note was so given to recover back the moneys paid. As to whether one who aids in doing a criminal act can, under any circumstances, have an action to recover anything paid by him in furtherance thereof, *quære*: *Hayner v. Radd*, 83 N. Y., 251, reversing 17 Hun, 477.

On the second trial of this action to recover the amount of plaintiff's note paid to defendant, the jury having found under proper instructions and sufficient evidence that the note was paid as well as given under a threat of defendant to have plaintiff's son arrested and prosecuted for burglary or larceny (46 Wisc., 313), and that it was not given to compound a crime, a judgment in plaintiff's favor is affirmed: *Schultz v. Culbertson*, 49 Wisc., 122.

The court below instructed the jury, that if they found the note in suit was given by defendant to plaintiff, to secure payment of money stolen by defendant's son, without any threat or promise by plaintiff to have the son's sentence made heavier or lighter, the transaction was lawful, and the note, if based upon it, was for a sufficient consideration. Held, to be error. A note given to secure the payment of damages, arising from the tort of a stranger, without other consideration, is *nudum pactum*: *Connery v. Macfarlane*, 97 Penn. St. Rep., 361.

While a court of equity will not lend its aid to enforce the performance of a contract which has been entered into by both parties for an illegal purpose, yet, when the contract has been executed by one party conveying real estate for the purpose of compounding a felony, the court will not in general interfere, but will leave the title to the property where the parties have placed it: *Compton v. Bunker Hill, etc.*, 96 Ills., 302.

The payments of tolls exacted by a canal company whose right to the same

is disputed, but which, by the exercise of threats and other means of coercion, compels the parties to accede to its demands or be put to considerable loss in their business, are such involuntary payments that the company will be compelled to make restitution upon suit for their recovery: *Lehigh, etc., v. Brown*, 39 Leg. Int., 467, probably to appear in 99 or 100 Penn. St. R.

The payment to a marshal of money by a wife, the owner of property, to save it from a threatened seizure under an execution held by the marshal against her husband, is not a voluntary payment, and the wife can recover the money in an action against the marshal. The law is the same where the money is so paid in instalments at different times during the life of the execution and the continuance of the threats: *Coady v. Curry*, 8 Daly, 58.

Plaintiff chartered defendant's vessel for a voyage from Charleston to Liverpool or Havre, for a sum named; bills of lading were to be signed by the master, but without prejudice to the charter. It was agreed that any difference between the bills of lading and the charterparty was to be settled at Charleston before the vessel sailed, in accordance with the rates of freight, weight, etc., expressed in the bills of lading, if in the charterer's favor, "by the captain's bill, payable ten days after arrival at the port of discharge." Plaintiff furnished a cargo of cotton consigned to Liverpool. By the custom at that port, which was well known to plaintiff and the master, freight is only collectible on net weight of cotton. Plaintiff calculated the freight upon the gross weight of the cotton covered by the bills of lading, and after the vessel was laden ready for sea, he demanded of the master a bill of exchange for the difference; the latter objected on the ground that the tare should be allowed. Plaintiff was agent for the owners of the vessel, and he alone could get clearance for her at the custom house; he refused to clear and allow her to proceed unless the master would sign the bill, and an agreement that the question in dispute should abide the decision of the "United States Court at Charleston," in a case then pending. The captain thereupon signed. In an action upon the bill so given, held, that the char-

terparty contemplated the bills of lading should be resorted to in the first instance as a means of payment to the shipowners, and plaintiff was entitled to credit for no more than they actually represented; i.e., the amount collectible thereon; that in the absence of words of exclusion in the charterparty, it should be held to have been framed in reference to the usage, which should, therefore, have been taken into consideration in estimating the amount due on the bills of lading; and that defendants were not concluded by the bill or the agreement. 1st. As the bill was not delivered in final settlement of the claim but under an agreement in effect, an arbitration, which the captain, as agent for the owners, had no authority to make. 2d. Because the unlawful refusal of plaintiff to allow the vessel to leave the port until the bill was signed, constituted duress. It seems that it is not duress for a person to insist on his legal rights: *McPherson v. Cox*, 86 N. Y., 472, reversing 21 Hun, 493.

If A. obtains possession of a deed and uses it for the purpose of extorting money from B. as the price of its preservation or of permission to use it in defending his title, and by threats, express or implied, gives B. to understand that the deed would be withheld or destroyed unless his demand were complied with, the payment is to be deemed involuntary, and the wrongdoer shall be compelled to make restitution: *Motz v. Mitchell*, 91 Penn. St. R., 114.

A contract for certain logs, provided that they should be measured or scaled in accordance with the standard rules or scales in general use on Muskegon lake and river: Held, that the scale in general use at the time the scaling was required to be done, and not that in use at the time of making the contract, was the one intended. Defendants being indebted to plaintiff in a considerable amount, and taking advantage of his financial circumstances, refused to pay him unless he would receive in full a less sum than he claimed; and he being in pressing need of the money, received the sum offered and gave the receipt. Held, (distinguishing *Vyne v. Glenn*, 41 Mich., 112,) not duress of goods. Duress of person and goods defined:

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Trimble v. Hill.

J.C.

Hackley v. Headley, 8 Northwestern Repr., 511; S. C., 45 Mich., 569, 21 Amer. L. Reg. (N.S.), 109.

If payment be made of unreasonable charges to a cotton compress company, with full knowledge of all the facts and without fraud, deception or duress, the payment cannot be recovered back even as to the amount paid, without consideration.

A mere protest against a charge does not entitle the party who voluntarily, and without duress or compulsion, pays it to recover it back.

To entitle a party who has paid money, to recover it back on the ground of duress, he must at the time of payment have been under the necessity of either then making the payment, or of resorting to the courts to get possession of the property wrongfully detained, or to recover his liberty, or he must at least show that there was an apparent necessity of resorting to the courts for one or the other of these purposes: Ladd v. The L. C. P. & M. Co., 53 Texas, 173.

A person having been indicted for an alleged offence, his brother paid to an attorney at law a sum of money, and also gave to him his promissory note for a further sum, the agreement being that the attorney should defend the party so indicted, and procure his acquittal and discharge at a certain specified term of the court in which the indictment was pending, it being further specially agreed that if the accused should not be released at the time mentioned, the attorney was to return the money and the note. The accused failed to appear at the term specified to answer to the indictment, so the attorney, without any fault on his part, was unable to proceed with the trial or to procure the discharge of the accused. Held, the contingency upon which the attorney was to be entitled to retain the money and to collect the note not having occurred, he was liable to an action for the money and could not recover upon the note.

But for what services the attorney in good faith rendered in pursuance to the terms of the agreement, before ascertaining that its performance had become impossible, he was entitled to compensation, and that sum he could rightfully retain out of the money he

had received: Moore v. Robinson, 92 Ills., 491.

Only those affected by unlawful fear or restraint may plead duress in avoidance of their contracts; sureties cannot plead the duress of their principal in discharge of their own liability: Tucker v. State, 72 Ind., 242.

Duress of the maker of a promissory note is no defence to an indorser who signs the note voluntarily and upon a sufficient consideration: Bowman v. Hiller, 130 Mass., 153.

Where a promissory note was obtained by duress of the maker, and indorsed in good faith, without any knowledge of the duress on the part of the indorser, in a suit by the holder, who was guilty of the duress, against the indorser, the latter may set up the duress of the maker as a defence to the note: Griffith v. Sitgreaves, 90 Penn. St. R., 161.

The assignee of a debt or chose in action may avail himself of the fact of duress operating on the assignor, just as the assignor might have done in a suit by or against himself: Smith v. Cottrell, 8 Baxt. (Tenn.), 62.

A father may avoid a mortgage which he has been induced to sign by threats of the prosecution and imprisonment of his son: Harris v. Carmody, 131 Mass., 51, 20 Am. L. Reg. (N.S.), 663.

Duress is matter in avoidance which must be specially pleaded: Smith v. Cottrell, 8 Baxt. (Tenn.), 62.

See Harris v. Carmody, 20 Amer. Law Reg. (N.S.), 663, 131 Mass., 51; Metropolitan, etc., v. Meeker, 85 N. Y., 614.

A conveyance to children just prior to, and in contemplation of a second marriage, and without the knowledge of the wife, will not in *lonea* be construed as a fraud on the rights of the wife: Hamilton v. Smith, 57 Iowa, 15. See cases cited, p. 18.

The general rule is otherwise, and such a conveyance would be held a fraud upon the rights of the wife so far as her dower in the lands so conveyed are concerned, and so as against the marital rights of the husband of a wife who so conveyed, though each case must be judged by its circumstances: 14 Cent. L. J., 102, and cases cited.

Delaware: Chandler v. Hollingsworth, 3 Del. Chy., 99.

Pennsylvania: McClurg v. Schwartz, 87 Penn. St. R., 521; Baird v. Stearne, 12 Weekly Notes (Penn.), 205; Bier's Appeal, 92 Penn. St. R., 265.

Tennessee: Hall v. Carmichael, 8 Baxter, 211.

So a conveyance by a man to a woman of his property in consideration that she would marry him, with her knowledge that the property remaining in his hands is not sufficient to satisfy his creditors, is void as against them.

It is not sufficient consideration to support such conveyance against creditors that she gave up a profitable business to marry the grantor: Keep v. Keep, 7 Abb. N. C., 240; Gordon v. Worthley, 48 Iowa, 429.

Though such a conveyance would be good except as against existing creditors who would be defrauded thereby: Ploss v. Thomas, 6 Mo. App., 157.

A wife is not entitled to dower out of lands of her husband which before her marriage have been fraudulently conveyed to another, though the conveyance is subsequently set aside at the instance of creditors: Gross v. Lange, 70 Mo., 45.

The liability of a surety is always *strictissimi juris*, and may not be extended by construction beyond his engagement: National, etc., v. Conklin, 90 N. Y., 116, affirming 24 Hun, 496.

The sureties to a bond, conditioned as prescribed by the statute (2 R. S., 77, § 42), given by an executor in pursuance of a surrogate's order, in proceedings under the statute (2 R. S., 72, §§ 18, 19, 20), against the executor, upon complaint made because of his removal from the State or for other cause specified, cannot limit their liability to deficiencies or defalcations of the executor occurring after the giving of the bond. The object of the statute was to provide against any improper use of the funds belonging to the estate without regard to the time of its occurrence, and the condition of the bond providing that the executor "shall obey all orders of the surrogate touching the administration of the estate," by its express terms, binds the obligors for a failure of the executor to obey an order as to the payment of moneys which came to the hands of

the executor, although lost or disposed of before the bond was executed: Schofield v. Churchill, 72 N. Y., 565, distinguishing Bissell v. Saxton, 66 N. Y., 55; Meyers v. U. S., 1 McLean, 493; Shankland v. Mayor, etc., of Washington, 5 Pet., 389, 16 Iowa, 81.

Sureties on an official bond of a public officer, of a guardian, receiver, etc., are not liable for a defalcation of such officer which occurred before the term of office for which they are sureties commenced: See 23 Eng. R., 167 note; 25 id., 508 note.

Alabama: City Council v. Hughes, 65 Ala., 201.

Illinois: Potter v. Board, 11 Bradw., 280.

Montana: Messonla v. Edwards, 3 Mont., 60, 64.

Iowa: Held v. Bagnell, 58 Iowa, 139.

Nebraska: Van Sickle v. Buffalo Co., 13 Neb., 103, 13 N. W. Rep., 19.

New York: Thompson v. McGregor, 81 N. Y., 592, 9 Abb. N. C., 138; Kellum v. Clark, 10 N. Y. Weekly Dig., 492, mem. 22 Hun, 143.

United States, Supreme Court: U. S. v. Stone, 106 U. S. R., 529.

Vermont: Barnet v. Abbot, 53 Verm., 120.

When a treasurer holds his office for several consecutive terms and is found to be a defaulter at the end of his last term, it will be presumed in the absence of proof to the contrary that the entire default originated and occurred within his last term: Kelley v. State, 25 Ohio St. R., 567; District v. McCord, 54 Iowa, 346.

See Ruffin v. Harrison, 86 N. C., 90.

In an action upon the bond of a defaulting treasurer, the question arose whether the defalcation was confined to his second term of office for which the bond was given. His cash book showed that at the end of his first term there was no deficiency, but he testified that there was "probably" or "possibly" a deficiency, though he did not discover it for a year afterwards: Held that there was nothing in this to show a defalcation during the term: Marquette v. Ward, 50 Mich., 174.

If a township treasurer's liability for funds in his hands can be discharged by anything but payment, there must at least be an intentional acceptance of another's responsibility instead: Rice v. Sidney, 44 Mich., 87.

As a general rule, when one person holds an obligation on another, and the obligor gives a new obligation for the same subject matter of as high or a higher dignity, such new obligation, independently of any express agreement, will operate as a satisfaction or extinguishment of the first obligation.

This is the legal presumption, which is liable to be rebutted, however, and this presumption is strengthened when there is a further and different security on the new obligation.

So where a defendant in an action of forcible entry and detainer, on an appeal from a judgment of a justice of the peace, gave an appeal bond in the penal sum of \$500, and afterward, by an order of the court, gave another bond in the sum of \$1,200, and again, under an order of the court to "file a good and sufficient new appeal bond" by a day named, gave a new bond in the penalty of \$2,000 with other and different sureties, it was held, in an action on the second of these bonds, that the giving and approval of the last bond in the case operated as a discharge and extinguishment of the prior bonds, and that such last bond embraced and covered all the appellant's liabilities growing out of the appeal, and that no recovery could be had on the second bond: *International Bank v. Poppers*, 105 Ills., 491.

A. was the county treasurer of Missoula county, and executed a bond Dec. 9, 1873, which was duly filed and approved. Some of the sureties wishing to be released therefrom, another bond was executed, filed and approved July 12, 1875. A settlement took place between the county commissioners and A., Sept. 7, 1875, when the second bond was accepted in lieu of the first. A.'s official term expired March 5, 1876, and there was a deficiency in his accounts as treasurer. This action was commenced against the sureties upon the first bond to recover the amount of the deficiency, and judgment was entered in their favor. Held, that the sureties on the first bond are not liable for any deficiency occurring in A.'s accounts after Sept. 7, 1875, and that the sureties on the second bond are liable therefor: *Missoula Co. v. Edwards*, 3 Montana, 60.

Where an administrator resigns and is reappointed, giving a new and differ-

ent bond, and decrees are rendered against him as administrator under the second appointment, and, on a settlement of the second administration, no execution can issue on such decrees against the sureties on the first bond: *Steele v. Graves*, 68 Ala., 17, Id., 21.

An officer holding over executed a bond for the full term, but having been re-elected at the next general election, he executed a new bond for the unexpired portion of the term. A defalcation having occurred, judgment was rendered against the sureties on the last bond for the whole amount. Held, that the last bond was not additional, or secondary to the first, but was an original undertaking; and that the sureties on the first bond were not co-sureties with those on the last bond, and could not be compelled to contribute to pay the judgment: *Boone County v. Jones*, 58 Iowa, 373.

The sheriff's bond is an annual bond, and his sureties are liable for his default during the time, only between the giving the bond passed by them, and the execution of the next year's bond: *Hewitt v. State*, 6 Har. & Johnson (Md.), 95, 14 Am. Dec., 259.

Where an officer served for two successive terms, his sureties under his second appointment are liable for taxes which he, during his service thereunder, collected upon assessment rolls received during the first term, and for moneys or stamps remaining on hand at the expiration of that term: *United States v. Stone*, 106 U. S. R., 525.

Where the office of treasurer of a corporation is annual or limited, the sureties on his official bond will not be liable for a breach of the duties of such officer beyond the definite term, when the condition is for good behavior during his continuance in office: *People v. Wroth*, 43 N. J. L., 70; *United States v. Stone*, 106 U. S. R., 529; *Mutual, etc., v. McMullen*, 1 Pennypacker (Penn.), 431.

But if there be added thereto "whether of the present term for which he has been elected or of any succeeding terms to or for which he may be elected," then liability continues: *People v. Worth*, 43 N. J. L., 70.

On the appointment by plaintiff of defendant C. as its bookkeeper he executed to it a bond with sureties, which, after reciting such appointment and

the acceptance thereof by C., was conditioned that he should faithfully perform the duties and trusts imposed upon him as such bookkeeper, and "the duties of any other office, trust or employment relating to the business of said association which may be assigned to him, or which he shall undertake to perform." After service for several years as bookkeeper C. was appointed plaintiff's receiving teller, and while acting in that capacity embezzled \$2,700 of the funds of the bank. In an action on the bond; held, that the sureties were not liable; that the recital controlled the condition, and the sureties undertook only for the fidelity of their principal while he was bookkeeper, both in the performance of the duties of that office, and of any other office trust or employment *temporarily* imposed upon or assumed by him during that time relating to the plaintiff's business: *National, etc., v. Conklin*, 90 N. Y., 116, affirming 24 Hun, 496.

Where a county treasurer, who is also ex officio collector, makes a report of county moneys received by him as collector, the sum so reported will be transferred to his account as treasurer, and he will be credited as collector, after which he and his sureties as treasurer will be liable for the same.

Illinois: *Cawley v. People*, 95 Ills., 250.

North Carolina: *Ruffin v. Harrison*, 86 N. C., 190.

And it matters not that such report is approved after he has absconded, where it is approved as made without any alteration: *Cawley v. People*, 95 Ills., 250.

An entry by a town clerk, carrying an apparent balance over from the account of one town treasurer to his successor, is no evidence of the receipt of the money *by the latter*, even though his deputy had, without his knowledge, settled the account of the office accordingly: *Rice v. Sidney*, 44 Mich., 37.

Where an officer is elected his own successor, the law will transfer any balance in his hands at the end of the preceding term to his second term, and he and his sureties will be concluded from denying that the sum so reported was not in his hands as treasurer of the last term.

Illinois: *Cawley v. People*, 95 Ills., 250.

Where a county treasurer, after his re-election, makes an official report, showing a balance of county funds in his hands, the act being within his official duty, his sureties are concluded from showing that the amount so shown was not actually in the treasury at the time the report was made: *Cawley v. People*, 95 Ills., 250.

Where one being liable for trust funds to an infant is appointed guardian of the infant, and in his report to the county court charges himself with such money as then in his hands, the surety of the guardian will not be permitted to exonerate himself from liability as to such money, by showing that the person who had thus become guardian had squandered the same before his appointment: *Fogarty v. Ream*, 100 Ills., 366.

If a guardian makes fictitious reports to the county court, falsely charging himself with money not in fact due from him to his ward, for the fraudulent purpose of making his surety liable, a court of equity will doubtless interfere at the suit of the surety to correct such reports, and make them conform to the truth as to the amount of money in fact owing by the principal: *Fogarty v. Ream*, 100 Ills., 366.

Where, at the death of a guardian, the funds of his ward were in the hands of the attorney of the guardian, who, as the attorney also of the executor of the guardian's estate, had the same inventoried by the executor as coming to his hands, and such attorney, on being appointed as guardian of the ward, procured the allowance of a claim against the estate of the former guardian in favor of the ward for such sum, and afterwards reported to the county court the receipt of the amount of such claim as paid by the executor, when, in fact, no money passed between them, it was held, that the surety of the guardian could not have such report set aside as fraudulent, simply because no money, in fact, passed from the executor to the guardian. The charge made against the guardian in such case would not be regarded as fictitious, he being in fact liable in such amount to the ward: *Fogarty v. Ream*, 100 Ills., 366.

Where the administrator of an estate

was appointed commissioner in partition to sell lands of the estate, and upon making sale was ordered to pay a certain portion of the proceeds to the widow in lieu of homestead and dower, and the remainder, after satisfying certain demands, to himself as administrator, and the widow, without giving a supersedeas bond, appealed from this order, claiming a larger share of the proceeds :

Held, that as to the part not claimed by her ; it was not only the right but the duty of the commissioner to transfer it to himself as administrator pending the appeal.

The evidence in the present case failed to show that funds held by deceased as commissioner in partition were transferred by him to himself as administrator : *Babb v. Ellis*, 76 Mo., 459.

The accounts of an officer are *prima facie* evidence against his sureties as well as against himself : *Kellum v. Clark*, 10 N. Y. Weekly Dig., 492, mem. 22 Hun, 143 ; *Cawley v. People*, 95 Ills., 250 ; *U. S. v. Stone*, 106 U. S. R., 525.

A township treasurer's sureties cannot be bound by a false statement of his accounts : *Rice v. Sidney*, 44 Michigan, 87.

Statements made by a county treasurer to the board of commissioners of the amount of money in his hands, at the commencement of his third term of office, were not conclusive upon the sureties, nor were they estopped from denying, impeaching or contradicting the same : *Van Sickel v. Buffalo Co.*, 13 Neb., 103, 13 N. W. Repr., 19 ; *U. S. v. Stone*, 106 U. S. R., 525.

The bond of a town treasurer given for the faithful performance of his official duty not executed till near the close of his term, but *ante-dated*, binds his sureties to respond in damages for all malfeasance or misfeasance in office during the year for which he was elected : *Barnet v. Abbott*, 53 Verm., 120.

See *Kelley v. State*, 25 Ohio St. R., 567.

The surety upon the bond which a guardian was required, under the revision, to give when he entered upon the discharge of his duties, was not liable for the loss or misappropriation of any money coming into the guar-

dian's possession from the sale of his ward's lands, a special bond being required for the faithful performance of his duty in that respect : *Madison County v. Johnston*, 51 Iowa, 152.

Moneys received by a public officer during one term, when paid to the creditor must, in favor of sureties, be credited on the account of the term for which they were received ; and neither the principal nor the creditor, nor both, can deprive them of the benefit of such a payment.

Alabama : *Boring v. Williams*, 17 Ala., 510, 525.

Delaware : *Pickering v. Day*, 2 Del. Chy., 334, 367.

Maine : *Porter v. Stanley*, 47 Maine, 518.

New York : *Seymour v. Van Slyck*, 8 Wend., 403, 420.

Texas : *State v. Middleton*, 57 Tex., 185, 188, 190.

United States, Supreme Court : *U. S. v. Eckford*, 1 How., 261 ; *U. S. v. January*, 7 Cranch, 572.

See *Jones v. U. S.*, 7 How., 681, 688.

United States, Circuit and District : *Myers v. U. S.*, 1 McLean, 493, 496.

Vermont : See *Lyndon v. Miller*, 36 Verm., 329, disapproved in *State v. Middleton*, 57 Tex., 190.

Virginia : See *Chapman v. Com.*, 25 Gratt., 742, disapproved in *State v. Middleton*, 57 Tex., 190.

Sureties for one term may show that credits have been given to their principal on a prior account, that belonged to a subsequent one, and that he had been debited in the latter with items improperly transferred from previous ones : *U. S. v. Stone*, 106 U. S., 525, 532.

Where a county board neither approved nor disapproved an official bond, but appointed a committee to ascertain and report whether the security was sufficient, and the committee required additional names to the bond, and when this was done reported the security as sufficient, this was held no rejection of the bond by the committee ; and it was further held, that the committee had no power to approve or reject the same, and that this could be done only by the board as an organized body, and that they could not delegate the power to others : *Cawley v. People*, 95 Ills., 250.

As to when a debt due from A. as trustee will be held paid to A. as executor or administrator: *State v. Chester*, 51 Md., 354; *Kirby v. State*, Id., 383.

If an executor or administrator owe a debt to his testator or intestate, his bond given for the faithful discharge of his trust covers such debt: See 2 Wms. Executors (6th Am. ed.), 1418, bottom p. 1810.

Iowa: See *Kaster v. Pierson*, 27 Iowa, 90.

Maryland: *State v. Cheston*, 54 Md., 354; *Kirby v. State*, Id., 383.

Massachusetts: *Winship v. Bass*, 12 Mass., 198.

New York: See *Everts v. Everts*, 63 Barb., 577; *Smith v. Lawrence*, 11 Paige, 206; *Adair v. Brimmer*, 74 N. Y., 540, 555; *Baucus v. Stern*, 89 Id., 1, reversing 24 Hun, 109; *Wurts v. Jenkins*, 11 Barb., 546; *Marvin v. Stone*, 2 Cowen, 781; *Soverhill v. Suydam*, 59 N. Y., 140, affirming 2 Thomp. & Cook, 460; *Decker v. Miller*, 2 Paige, 149.

Tennessee: *Spurlock v. Earles*, 8 Bart., 437.

Executors filed a joint account; upon exceptions it was proper to charge them jointly with their omitted notes, of which ten-elevens were due by one of them. To escape liability, the objecting executor should have filed a separate account, or insisted upon his co-executor accounting for their notes in their joint accounts: *Bierly's Estate*, 81 Penn. St. R. (Sup.), 419.

An administrator is chargeable with interest upon his own note to the decedent, until the time of actual payment to the estate. The note is not paid by operation of law: *Rodenbach's Appeal*, 13 Weekly Notes (Penn.), 288.

Money came into the hands of a trustee in a sequestration and was available for payment of dividend. The trustee was also attorney of a creditor of the bankrupt. He kept it in a safe, and made payment of dividend out of it to various creditors, but took no step to transfer any part of it from himself as trustee to himself as attorney for the creditor:

Held, that such a transfer could not be effected by mere intention to hold as attorney, and that an arrestment used in his hands as trustee in the sequestration was a good arrestment:

Stewart v. Dalgleish, 19 Scott. L. Repr., 599.

Where an administrator of an estate is also guardian for the sole heir and distributee, and closes the administration of the estate substantially, though he makes no report of the same to the county court, and charges himself in a private book with the funds due the heir, and pays the necessary expenses of his ward and collects the rents as guardian, and a reasonable time has elapsed for completing the administration of the estate, his sureties as administrator will be released, and his sureties as guardian will be liable for the funds which came into his hands in the capacity of administrator.

Where a person sustains the dual relation or trust of administrator and of guardian of the sole distributee, and before his death makes no settlement of his accounts, or does any other act showing an election as to the capacity in which he holds the unexpended funds of the estate in his hands, it will be presumed after a reasonable time for settling the estate has elapsed, and especially after the administration of the estate has been completed, that he held such funds as guardian, and his sureties as guardian alone will be liable for the same. An order of the county court transferring the funds in his hands as administrator is not indispensable in such case to charge his sureties as guardian: *Bell v. The People*, 94 Ills., 230.

A., the guardian of a minor, at the time of his death, held the promissory note of B., payable on demand to his order as guardian. B. and C. were appointed executors of A.'s will, but no mention of the note was made in their inventory or accounts. C. was also appointed guardian in place of A., and several payments were subsequently indorsed upon the note, leaving a balance due. C. died and D. was appointed guardian in his stead, and he refused to receive the note as the property of his ward. B. resigned his office as executor, and E. was appointed administrator with the will annexed of the estate of A., brought an action against B. on the note, obtained judgment and levied execution on land which B. had conveyed in fraud of his creditors. Held, on a writ of entry by the purchaser at the sale on execution

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to recover possession of the land, that the note was extinguished as a contract; that the amount due thereon having become assets in the hands of B. as executor of A., no action could be maintained upon it by E.; and that the tenant not being a party or privy to the action by E., was not concluded by the judgment therein: *Tarbell v. Jewett*, 129 Mass., 457.

Where, after the giving of bond, the guardian, to discharge a debt due by him in his private capacity to the executor of the will of the ancestor of the ward, receipts to the executor for the whole or a part of the distributive share of the estate coming to the ward, but there is no actual receipt and transfer of the money, the executor simply crediting himself with the amount as so much paid to the guardian on account of the ward, the guardian is chargeable with such sum in his accounts with the ward, and the sureties upon the bond are liable therefor in case of his failure to perform his trust in accordance with its conditions: *Pfeiffer v. Knapp*, 17 Florida, 144.

The surety of a guardian who is compelled to pay money to a succeeding guardian of a ward, will in equity be subrogated to all the rights of such succeeding guardian against other persons for the same money: *Fogarty v. Ream*, 100 Ills., 366.

Where a bank receives a bill of exchange for collection, payable at a distant place, its liability is discharged by transmitting the same, in due time, to a suitable and reputable bank or other agent, at the place of payment, and in such case the principal's assent to such employment of a sub-agent is implied.

If a debt be lost by negligence of an agent to whom a bill of exchange is sent for collection, the principal or home bank (having complied with its duty not being liable to the holder) cannot, by voluntarily discharging the claim of the payee, maintain an action on the case for negligence against the sub-agent. Such right accrues, under the circumstances, only to the holder or payee of the bill: *Bank of Louisville v. Bank of Knoxville*, 8 Baxt. (Tenn.), 101.

Where the holder of a bill of exchange payable at a distant place de-

posits it with a local bank for collection, he thereby assents to the course of business of banks to collect through correspondents, and the correspondent of the local bank to which the bill is forwarded becomes his agent, and is responsible to him directly for negligence in failing to present the bill for payment within the proper time: *Guelich v. The National State Bank of Burlington*, 56 Iowa, 434.

A party in Illinois transmitted to bankers residing in a city in Mississippi a note for collection, which was then dated, but did not inform them, nor were they aware of the residence of the maker. The only instruction sent was that the note was to be collected, if paid, and if not paid on presentment it was to be protested, and notice of non-payment sent to the indorser. In due time they put the note in the hands of a reputable notary of that city for the purpose of presentment and demand, and of notice to the indorser, should there be a default of payment:

Held, that they are not liable to their correspondent for the manner in which the notary performed his duty.

The notary is a public officer; and when he received the note he, according to the ruling of the Supreme Court of that State, became the agent of the holder, and for failure to discharge his duties he alone is liable.

The duty and liability of bankers as collecting agents stated, and the authorities bearing upon their responsibility for the acts of the notary to whom the notes sent to them for collection are delivered for presentment, demand and protest, cited and examined: *Britton v. Niccolls*, 104 U. S. Rep., 757.

The plaintiff, who was indorsee of the note sued on, sent it to a bank for collection. The notary of the bank read the plaintiff's name Darcy, instead of Davey, and the notices of protest, being sent to Darcy, never reached the plaintiff, Davey, so that he failed to give the requisite notice to his indorser, the defendant Jones: Held, that the plaintiff is not entitled to recover against Jones.

The bank knew who the holder was, and was bound to inform the notary who was its agent, and not the agent

of the plaintiff. The notary, therefore, was chargeable with the knowledge which the bank had.

A bank which assumes the duty of a collecting agent is absolutely liable for any negligence or default of a notary or correspondent, as well as of its own immediate servants, in relation to it: *Davey v. Jones*, 42 N. J. L., 28.

The plaintiff, a customer of the defendants' branch bank at Chatham, handed to the manager there for collection a note made by G. C. to and indorsed by T. C., both of whom lived at Detroit, where the note was made and payable. The Chatham branch stamped above the indorsement of T. C. a special indorsement to themselves, but the Chatham manager without indorsing the note sent it to their Windsor branch for collection—Windsor being their nearest branch for Detroit—without any instructions as to the place of residence of the indorser, who, however, was well known in Detroit. The manager of the Windsor branch indorsed it to the cashier of the First National Bank, their agent there, and sent it to him for collection. Payment having been refused upon presentation, they handed it to a notary, who duly protested it, but inclosed the notice for T. C., the indorser, in the envelope containing the notice to the Windsor branch, addressed to the manager of that branch. A clerk in the Windsor branch sent the notice for T. C. to the Chatham branch, which was duly posted at Windsor, but was never received from the Chatham post office, and T. C., the indorser, never received any notice. The Chatham manager received the protest by due course of mail, and could have seen from it in time to rectify the mistake that the notice for T. C. had been addressed to the Windsor agent. The indorser having been sued in Detroit, escaped on the ground of want of notice, and the maker being worthless, the payee sued defendants for neglect with regard to such notice.

It appeared that in Detroit it was the custom for the notary to send notices for the indorser to the bank from which the note was received. It was contended for defendants that the branches were for this purpose distinct; that the notice was properly sent to Windsor, and thence to the Chatham

branch whence the note came; and that but for the neglect of the post office, the notice would have been duly received at Chatham and sent to the indorser. But held, that the defendants were liable; that on sending the note to their Windsor agent, they should have given proper information as to the residence of the indorser, for the guidance of the notary; and that the Chatham branch having notice from the protest, which they should have examined, that the notice for the indorser had been sent to Windsor, they should at once have had a proper notice served in Detroit, which they could have done in time: *Steinhoff v. Bank*, 46 U. C. Q. B., 25.

Defendant received from plaintiffs for collection a check drawn upon a bank in New Jersey, and sent it by mail to the drawee, which was and had been for 15 years its collecting agent in New Jersey, under an arrangement that all collections made by it for defendant should be credited to the latter in a collection account, which was settled once a week. Said drawee upon receipt charged the check to the drawer and credited defendant with the amount in said account, and the next day suspended payment. In an action to recover the amount of the check, held that the drawee under said arrangement had the right to discharge the drawer and substitute itself as debtor, which it did; and that defendant must be regarded as having accepted the responsibility of the drawee upon its credit in the collection account as payment of the check, and was consequently liable therefor: *Briggs v. Central*, etc., 89 N. Y., 182, distinguishing *Indig v. National*, etc., 80 N. Y., 100.

Pursuant to orders received from A., the owner of the Corn Exchange Elevator at Oswego, who was engaged in storing grain for the public and doing business on his own account, B. bought for him two cargoes of wheat, and drew sight and time drafts for the purchase-money. C., a bank at Milwaukee, bought the drafts and received the bills of lading. The latter describe B. as the shipper, and, by their terms, each cargo was to be delivered at Oswego to the account or order of D., cashier of C., care of the City Bank. C. thereupon indorsed the drafts and

bills of lading to the City Bank, saying, "On payment of the drafts you will deliver the cargo to the order of A. If not paid, please hold and advise by telegraph." The bank acknowledged their receipt, and presented the sight drafts to A., who paid them and accepted the time drafts. Upon the arrival of the wheat at Oswego, the master of each vessel reported to the cashier of the City Bank, who, knowing that A. was the owner of the Corn Exchange Elevator, indorsed the bills of lading, "Deliver to the Corn Exchange Elevator for account of D., cashier, Milwaukee, subject to the order of the City Bank, Oswego." After the wheat had been so delivered, A. sold and shipped it. In its account with C., the City Bank made a charge for its trouble beyond the customary percentage for collecting and remitting the proceeds of the drafts. Before the time drafts became due A. failed. They were duly protested for non-payment, and have not been paid. In an action by C. against the City Bank,—Held, 1. That the City Bank, in receiving and acknowledging the drafts and bills of lading, with the accompanying instructions, became the agent of C. in the business which it had undertaken, 2. That whether, in discharging its duties as such agent, it exercised reasonable diligence and care, is a question for the jury, which the court below should not have withdrawn from them and decided: *National Bank v. City Bank*, 103 U. S. R., 668.

Defendant having received from plaintiff for collection, a draft drawn by a Pennsylvania bank, on C. P. C., bankers in N. Y., delivered the draft to the drawers on receipt of their check for the amount: this was not presented for payment until the next day, when payment was refused, C. P. & Co. having failed on that day. Defendant thereupon returned the check to C. P. & Co., and received back the draft, demanded payment, caused the same to be protested for non-payment, and the next day served notice of protest upon the drawer. In an action to recover damages for alleged negligence, it was held that defendant was liable, but that as the remedy against the drawer was preserved, defendant was only liable for the actual damages (77 N. Y., 320). On a second trial for the purpose of

showing damage to the full amount of the draft, plaintiff offered in evidence a judgment record in an action brought by it in a Pennsylvania court against the drawer, whereby it was adjudged that the acceptance of the check and omission to make due presentment constituted as between the drawer, the payee, and defendant, a payment and discharged the drawer's liability. Held, that the record was competent evidence, and conclusively established plaintiff's damages to be the full amount of the draft.

Also held, that it was not incumbent upon plaintiff as a condition of recovery to tender the draft to defendant: *First, etc., v. Fourth, etc.*, 89 N. Y., 412.

A., a bank, holding a check drawn in its favor, indorsed it to B., a bank, "for collection for account of" A., and sent it by mail to B., with a letter from the cashier of A., stating, "I inclose for collection and cr., as stated below" (specifying other checks and drafts sent), which check was by B. placed upon its "collection register," where all such checks, etc., received for collection only, were entered, and treated by it as the property of the party remitting the same, and no credit given therefor until collected. The cashier of B. indorsed the check for collection, and transmitted it to C., a bank, with authority, by letter, to credit the former with the proceeds when collected. B. on the same day failed, and was taken possession of by a bank examiner. Two days thereafter C. received the check, and, by its cashier, presented the check, received payment thereof, and credited the amount on its books to B., which was, at the time, on account of previous dealings, largely indebted to C. Before the cashier of C. collected the check, he had notice, by newspaper report, of the failure of B., but did not notify the drawee, who had no notice of such failure. Shortly afterwards the bank examiner, who had in his custody the books of B., without the knowledge or consent of A., credited A. and charged C. with the amount of the check on the books of B., the latter bank being, at the time the check was received, largely indebted to A. Action by A. against C., to recover the money collected on the check:

Held, that the plaintiff was entitled to recover: *The First National Bank, etc., v. The First National Bank, etc.*, 76 Indiana, 561.

A banking company is not liable for false representations alleged to have been made by its president, but not shown to have been known to him at the time to be untrue.

As it is not a part of the general business of a bank to act as an agent in the employment of attorneys to bring suit upon a draft deposited with it for collection, or in the compromise of such a claim, it is not liable for representations alleged to have been made by its president in respect of such a matter, as to which it has not conferred upon him any special authority, and has not been in any way benefited by his acts: *Ryan v. Manufacturers, etc.*, 9 Daly, 308.

The liability to a bank of its collecting agent, resulting from an appropriating to his own use the proceeds of notes and drafts sent to him by the bank, to which they were intrusted for collection, is not a fiduciary debt, and is dischargeable under the bankrupt act: *Green v. Chilton*, 57 Miss., 598.

A bank acting as the collecting agent of another bank, has, in the absence of special authority or usage, no right to receive payment in anything but money; if it receives the check of the debtor on another bank, this is conditional payment only, and it becomes the agent of the drawer of the check to receive the money thereon, and until the money is received the payment is not complete: *Levi v. National Bank*, 5 Dillon, 104.

The defendant bank received from the plaintiffs, their correspondent, a bill of exchange "for collection and credit," accepted from the drawee his check on a third bank for the amount and surrendered the bill of exchange. On presenting the check, instead of demanding the money thereon, it accepted its certification as good, and suspended the same day, having previously credited the plaintiffs with the amount. On the day after its suspension it collected the certified check. A receiver having been appointed, the amount, mingled with other moneys, came into his hands. The question was, whether the defendant bank was

a general debtor to the plaintiffs for the amount, or whether the money received on the check was held in trust for them. Held, it was so received on trust, and judgment ordered for the plaintiffs: *Levi v. National Bank*, 5 Dillon, 104.

The C. N. bank, having received from a customer of the M. & M. bank a check upon the bank, sent it to the drawee for payment; the M. & M. bank charged the check to the drawer, whose account was then good for the amount, and returned the check to the drawer as paid; it sent to the C. N. bank a draft on a New York bank for the amount of the check, two days after the M. & M. bank closed its doors and a receiver of its assets was appointed; the draft was paid. On application by the C. N. bank for an order requiring the receiver to pay the amount of the check, upon the ground that the assets came to the hands of the receiver impressed with a trust in favor of the C. N. bank, held, that the order was properly denied; that in order to authorize the relief prayed for, it was necessary to trace into the hands of the receiver, money or property which belonged to the C. N. bank, or which had, before the receivership, been set apart and appropriated to the payment of the check; that charging said check and returning it to the drawer did not amount to a payment and setting apart of sufficient of the drawer's deposit to cover it, nor did it impress a special trust on any part of the drawer's assets; but by the transaction the drawee simply reduced its indebtedness to its depositor to the amount of the check, and constituted itself a debtor to the holder to a corresponding amount: *People v. Merchants, etc., Bank*, 78 N. Y., 269; distinguishing, *In re Le Blanc*, 14 Hun, 8, 75 N. Y., 598.

The ordinary relation between a banker and his customer, as respects money deposited by the latter with the former, is that of debtor and creditor; but, on the special circumstances of this case, the relation between the two, as respects a specific sum of money remitted by the banker at the request of the customer to another bank to pay a specified debt of the customer, was held to be that of principal and agent, or trus-

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Ex parte Nicolle.

J.C.

tee and *cestui que trust*, and not that of debtor and creditor: *St. Louis v. Johnson*, 5 Dillon, 241.

On the 2d of Sept., 1873, the Erie Railway declared a dividend of one per cent. upon its stock, and deposited the money to pay the same with Duncan, Sherman & Co., Dec. 10, 1874; the money then remaining with the said firm was withdrawn by the company and subsequently passed, with its other property, to a receiver of the road. This application was made by the petitioner, who at the time the dividend was declared, was and still is a stockholder of the said road, to compel the receiver to pay him the amount of his dividend. Held, that the fund deposited with Duncan, Sherman & Co. should be regarded as specifically appropriated to the payment of the dividend, and that the stockholders acquired in equity a lien upon such fund to the extent of the amount to which they were respectively entitled, and that such lien followed the funds in the hands of the receiver. That a stockholder might apply in petition for such dividend, and was not obliged to bring an action therefor: *Matter of Le*

Blanc, 14 Hun, 8, affirmed 75 N. Y., 598.

Where a stockholder receives from a corporation dividends declared and admitted by it to be due to him on shares of the corporate stock, an action is not maintainable against him in the first instance, at the suit of one claiming to be entitled to share in the dividends, but whose rights had been ignored by the corporation, to recover as for moneys had and received, the proportion of the dividends so received, which plaintiff would have been entitled to had his shares participated. It seems that the remedy of one thus wrongfully excluded from the rights of a stockholder is against the company.

He cannot follow the assets of the company in the hands of parties to whom it has paid them, until at least he has established his rights as a creditor of the company, and has exhausted his legal remedies against it: *Peckham v. Van Wagenen*, 83 N. Y., 40, affirming 45 N. Y. Superior Ct. R., 328, and distinguishing *Le Roy v. Globe, etc.*, 2 Edw. Chy., 657; *Matter of Le Blanc*, 14 Hun, 8, 75 N. Y., 598.

[5 Appeal Cases, 346.]

J.C.*, July 29; Dec. 16, 1879.

[PRIVY COUNCIL.]

346]

**Ex parte* CHARLES NICOLLE.

ON APPEAL FROM THE ROYAL COURT OF JERSEY.

Law of Jersey—Curatelle—Person—Property.

By the law of Jersey in order to place a man under "*curatelle*" the court must be satisfied not merely that he is prodigal or likely to mismanage his property, but that he is so by reason of his habitual intemperance in the matter of drink. To establish the intemperance the court must not merely have the evidence of relatives (*les électeurs*), but the presentment after examination of *les six principaux*. A similar procedure is adopted for the removal of the interdiction and the reinstatement of the person in his civil rights.

When the court is satisfied that the interdiction should be reversed as regards the person, it has no power to continue the "*curatelle*" as regards the property upon a mere suggestion that it would be better and more expedient for the family so to do.

**Present*:—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

[5 Appeal Cases, 852.]

J.C.*, Jan. 29, 30, 31; Feb. 3, 1880.

[PRIVY COUNCIL.]

*PHILO LAMBKIN, *Plaintiff*; and THE SOUTH EAST- [352]
ERN RAILWAY COMPANY, *Defendants*.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE
OF QUEBEC, CANADA.

*New Trial—Damages—Misdirection—Negligence—Civil Procedure Code, s. 428,
subs. 11.*

Where a plaintiff had obtained against a railway company a verdict with damages, sustained by reason of an accident to a train in which he was a passenger, and a new trial was ordered by the Court of Queen's Bench on the ground alone of excessive damages, the finding as to negligence by the defendant company being approved by two courts:

Held, that inasmuch as there had been no misdirection, the judge having put to the jury whether all was done which was reasonably and practically possible under the circumstances of the case, and inasmuch as the damages were not of such an excessive character as to show that the jury had been either influenced by improper motives or led into error, there ought not to be a new trial.

APPEAL from a judgment of the Court of Queen's Bench (March 16, 1877), reversing a judgment of the Superior Court (Nov. 30, 1875,) sitting as a court of review, which was in favor of the plaintiff, and setting aside the verdict of the jury in his favor, and ordering a new trial on the sole ground that the damages were excessive.

The declaration stated that the respondents were public carriers and owners of a certain railway, and that on the 13th of August, 1874, while the appellant was lawfully travelling on the respondents' railway in respondents' carriages, the said carriages, with the appellant therein, were precipitated into an open culvert, and the appellant was so severely injured that for a month his life was despaired of, and he had never since been, and probably never would be, *able to attend to any business; that he had before [353] been doing a large and profitable business as an architect, builder, and manufacturer of doors, sashes, mouldings, and household furniture; and the appellant claimed \$50,000.

In their pleas the respondents admitted that they were public carriers and owners of the railway in question, and that on the 13th of August, while the appellant was being

* *Present*:—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

carried as a passenger in their cars on their railway, an accident occurred which seriously damaged the cars and might have damaged the appellant to an unknown extent; but they set up the defence that the accident was caused by a violent storm and flood, which made the gap into which the train fell, and prevented any warning being sent, either by telegraph or otherwise, so as to stop the train, and that there was no negligence on the part of them or their servants. The respondents also pleaded a *défense au fonds en fait*, taking issue generally.

The appellant filed his answer and replication, joining issue on the respondents' pleas.

The facts are stated in the judgment of their Lordships.

Mr. *Doutre*, Q.C. (of the Canadian bar), and Mr. *Fullarton*, for the appellants, contended that the verdict, with which the judge who tried the cause was altogether satisfied, should not be disturbed and a new trial ordered on a mere question of amount, unless under special and extraordinary circumstances, which did not exist and were not suggested in this case. They referred to the Canadian Civil Procedure Code, s. 426, subs. 11. The English rule is the same as the Canadian: see *Mayne on Damages*, p. 513; *Creed v. Fisher* (*); *Edgell v. Francis* (*); *Phillips v. South Western Railway Company* (*).

Mr. *Bompas*, Q.C., and Mr. *Jeune*, for the respondents, contended that the order for a new trial was right. There was misdirection in not sufficiently or correctly stating the circumstances under which the respondent company would be responsible for the negligence of its servants, or what [354] constituted such negligence. *There was no evidence of such negligence, and the damages were excessive.

Reference was made to *Nugent v. Smith* (*); *Railroad Company v. Reeves* (*).

The appellants were not called upon to reply.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER: This is an action brought against the South Eastern Railway Company of the province of Quebec to recover damages which the plaintiff sustained by reason of an accident to a train in which he was a passenger. The plaintiff obtained a verdict, with damages \$7,000. The railway company applied to the Superior Court of Montreal for a new trial upon a number of grounds,

(*) 9 Ex., 472.

(*) 1 M. & G., 222.

(*) 4 Q. B. D., 406; 28 Eng. R., 844;
48 L. J. (Q.B.), 698.

(*) 1 C. P. D., 19, 15 Eng. R., 203; in
Appeal, 423, 17 Eng. R., 330.

(*) 10 Wallace's Rep., 176.

including misdirection, the verdict being against the evidence, and the damages being excessive. That court unanimously expressed themselves satisfied with the verdict, and refused a new trial. Upon this the defendants appealed to the Court of Queen's Bench. The Court of Queen's Bench, as their Lordships understand, expressed their approval of the verdict, or, at all events, expressed no disapproval of it upon any ground except that of excessive damages; and upon that ground alone directed a new trial. From that judgment of the Court of Queen's Bench the present appeal is preferred.

It has been sought to uphold the judgment upon grounds other than that on which it was pronounced, viz., that the verdict, as far as it finds negligence on the part of the company, is against evidence, and that the judge misdirected the jury. With respect to the verdict being against evidence, it appears to their Lordships, as indeed they have before intimated, that the question of negligence, being one of fact for the jury, and the finding of the jury having been upheld or at all events not set aside by two courts, is not open under the ordinary practice to the defendants. However, the defendants have argued, as they had a right to argue, the question of misdirection; and the direction of the learned *judge cannot be considered altogether apart from [355 the evidence to which it applies.

Without going at length through the evidence, it is enough to say that the plaintiff was a passenger on the 13th of August, 1874, on the defendants' railway, and that the accident occurred at a point between the station of Abercorn and the station of Sutton, the distance from one to the other being about five-and-a-half miles; that the line between the two stations is intersected by a number of streams which are all spanned by bridges, and at times, perhaps generally, contain but little water, but are apt to be flooded after storms. It appears that on the evening before the accident, the 12th of August, a violent and most unusual storm had occurred, perhaps in the nature of a waterspout, which carried away five out of six bridges between the two stations. The next morning, at about half-past-six, the train in which the plaintiff was travelling dashed into the bed of one of these streams, of which the bridge had been demolished, without any warning whatever having been given to the driver of the train. The result was that some persons were killed and many injured—the plaintiff among them. It was the duty of four men, headed by one who is sometimes called "the boss," to look after the railway be-

tween these two stations, a part which would appear to require more than usual care and attention. It was the duty of these men, upon the occurrence of the storm, and some of the bridges being washed away to their knowledge on the previous evening, to use all exertions in their power to stop the train which was coming in the morning. Of two of these men we hear nothing. A third, Doran, who lived at a house rather more than a mile from Sutton, was called; and he speaks of a bridge close to his house being carried away, and of his apprehension that other bridges would be carried away, and says that upon starting on the line in the direction of the Abercorn station in the morning at about four o'clock he was unable to proceed. He then went to the Sutton station, and requested the station-master to telegraph to Abercorn, but it was ascertained that the telegraphic communication was interrupted. Doran, who had borrowed a horse, returned to his own house and planted a flag at the place where the bridge opposite to his house had been demolished; but instead of riding on to ascertain the 356] *state of the bridges between his house and Abercorn, he put the horse up and contented himself with remaining where he was. It appears to their Lordships that the jury might have come to the conclusion fairly upon the evidence that if he had ridden on he might have arrived at the place where the accident occurred in time to stop the coming train. White, the foreman or "boss," was not called. He appears to have done but little. He was aware, according to some evidence, that one of the bridges had been washed away as early as four o'clock in the morning. He appears to have made no effort to go beyond the bridge at Doran's house. The time he arrived there is not very clearly fixed. If it was, as Doran says, at a quarter before six, he would have had time to stop the coming train, which, although due before, did not arrive till half-past seven. Whether he was there at that time or not, it appears to their Lordships that upon the evidence the jury were warranted in the conclusion that he was guilty of negligence.

The summing-up of the learned judge must be taken with reference to the circumstances of the case and to the evidence. The following passage has been picked out and objected to: "First of all was there time to give notice? That, of course, is easily answered; there was time. Then, was there a possibility of doing it? That is the question." Their Lordships have read through the summing-up of the learned judge; and although he may not have explained the law quite as clearly or fully as might have been desired,

they are unable to see that he has misdirected the jury. He appears to have put to them as a question of fact whether there was time for either of the men to have got to the place of the accident so as to stop the train ; and further, whether, if there was time—that is, if there had been time under ordinary circumstances,—there were physical obstacles, such as the unusual depth of the intervening streams, which would have prevented it ; for, undoubtedly, during a portion of the night all the streams were so deep as to be scarcely passable, whereas in the morning the mountain flood had subsided almost as rapidly as it had arisen. The duty of the servants of the company must be taken with reference to the emergency ; and the jury might be properly told that those persons who had charge of the line ought, and were bound, to do all they could to stop the train which was rushing on *destruction. It ap- [357
pears from the summing-up, taken as a whole, that the learned judge, when using the word “possibility,” meant to put to the jury whether all was done which was reasonably and practically possible under the circumstances of the case. Their Lordships, therefore, are of opinion that there was no misdirection.

We now come to the question whether the damages were excessive. It appears that the plaintiff was found soon after the accident with his head jammed between two pieces of timber, that it took two or three hours to release him, which was done by cutting away the timber ; that he was then conveyed to Richford, a place at no great distance, and was attended to by two or three surgeons, among others, by a surgeon of the company. The surgeon who first saw him, or at all events who saw him very soon after the accident, is a Mr. Fassett, who thus describes his injuries : “The wounds upon the face were—a cut upon the right side of the lower jaw ; and above that, near the ear, there seemed to be a bruise. Upon the forehead, near the right, was a cut ; it seemed to be simply a cut. Over the left eye there was a severe bruise, which seemed to have been caused by pressure rather than a blow. That was the idea it gave me on examining it. The wound on his thigh was a lacerated and punctured wound. He lay upon the bed, apparently not noticing things around him, restless, tumbling about, not heeding anything apparently that was going on.” He goes on to say that the man was from time to time delirious, and adds : “I think I gave an opinion at the time at Richford that his condition was dangerous then, and if he recov-

ered at all he would probably not fully recover, and I am still inclined to favor that opinion." He attributes the injury of the brain to pressure, his theory being that the two sides of the skull were to a certain extent pressed together. The plaintiff was attended by Mr. Hamilton, a surgeon employed by the company to take care of the wounded, and he gives a description of the state of the plaintiff not materially different from that of the last witness. He says the plaintiff was delirious for two or three weeks when he attended him; that he was subsequently removed, and that he had seen but little of him between the time of the accident and the time of the trial, which was just twelve months. He expresses no very confident opinion about his state. He thinks 358] he may *recover, but will not undertake to say that he will or to fix any probable time for recovery. We have further the evidence of Dr. Gibson, the medical attendant of the plaintiff, who speaks of him as being in a very dangerous state at Richford, so dangerous that at one time his life was despaired of. He does not speak to having attended him very much subsequently, for his physical health appeared to have improved, and he says very candidly that he thought medicine would do him little good; but he speaks to having had a conversation with him shortly before the trial, from which it would appear that his brain was still affected; not that he was idiotic or insane, but that his conversation was rambling, and that he was unable to fix his ideas upon any subject or to attend to business. This witness also declines to give an opinion as to whether the man would ever thoroughly recover, although possibly he might recover.

There is a considerable body of other evidence. The plaintiff calls his brother, his cousin, and some neighbors, the effect of whose evidence may be shortly stated to be that the plaintiff was in partnership with his brother, the plaintiff being the elder and the more active partner; that they carried on business as builders, and that the plaintiff did the work of an architect,—was capable of designing a house or public building and seeing to the execution of his design; that they carried on business as manufacturers of cabinet and other articles; that the plaintiff also, being an active and industrious man, from time to time charged \$3 or \$4 a day for his own work, in addition to the profit on the work of the laborers he employed and on his materials; and that the two brothers were making some \$5,000 or \$6,000 a year. The evidence, though not perhaps as conclusive as might be

desired on this subject, is to the effect that the business had to a certain extent suffered. The brother said that he had to refuse some orders which otherwise he would have accepted; there is evidence on his part, and also that of the neighbors, of the business having fallen off; it is obviously probable that the business would fall off, more perhaps in future years than at once. There is further evidence that the plaintiff, although before the accident a strong vigorous man, with much capacity for business, became incapacitated for business; that he was weak and languid in physical *health, and unable to fix his attention continu- [359
ously upon one subject, from the time of the accident up to the time of the trial. One witness, a director of the company, who can scarcely be supposed to be biassed against them, says: "I have tried to talk business with him lately. I did not find him the same man that he used to be. If he goes to talk about business, he wanders directly and gets astray. I cannot say but what this must affect his fortune. He has not been engaged in building since the accident. I do not think he was able to do so."

On the part of the company Dr. Scott was called, who said that he did not think that the symptoms complained of by the plaintiff could arise from compression of the skull, inasmuch as he thought that, at the age of the plaintiff, the skull would not be compressible without fracture. The further effect of his evidence appears to be that he thought, from the description which he had heard of the injuries, that the plaintiff ought to have recovered, and therefore that he must be feigning illness. He says that, without having seen the plaintiff, he is as confident in his opinions as if he had seen him, a confidence which appears to their Lordships to contrast unfavorably with the caution with which the evidence of the other medical men is given.

Assuming the jury to have believed the evidence on the part of the plaintiffs, their Lordships think that they would have been wrong if they had confined the damages, which they had to assess once and for all, solely to what the plaintiff had lost at the time of action brought or at the time of the trial; that it was their duty to take into consideration that the plaintiff had been disabled for twelve months; that he had not then recovered, and that it was doubtful, according to the best evidence, whether he would recover at all, or, if he did recover, when he would recover; and although an estimate of future damages must necessarily be of a somewhat rough and speculative character, still that they were

bound to give him some damages in respect of the future loss which he would sustain.

The learned judges appear to have directed a new trial upon the supposition that the jury only gave damages in respect of what the plaintiff had lost at the time either of action brought or of the trial, and that those damages are 360] excessive. Such is the *view certainly of Mr. Justice Sanborn, who says: "It is impossible that three or four weeks' illness, and more or less loss of time for some months of a man who earned four dollars a day, could occasion a loss of \$7,000." Their Lordships may observe that Mr. Justice Sanborn seems not to have been quite correct in estimating the loss of the plaintiff as of a mere laborer who earned \$4 a day, inasmuch as the evidence is that the plaintiff not only earned \$4 a day in addition to the profit upon his workmen and materials, but carried on business as a manufacturer. It appears to have been inferred that the jury intended to assess damages only up to the time of the trial, from their answer to one of the questions put to them in the articulation of facts. But their Lordships are by no means satisfied that such was the intention of the jury. They are first asked: "Has the plaintiff ever since the sad accident been disabled from doing business, and to what extent is he disabled from attending to business? A. He has been disabled up to the present time;"—that is to say, they did not think him cured. Then this question is put, which divides itself into three: "Is the plaintiff the head of a family composed of his wife and three children? Are they all dependent upon his labor for their maintenance? Have they ever since been deprived of his labor, and to *what extent in the future will they be deprived of his labor?* A. He is the head of a family consisting of a wife and three children; one, a son, is not dependent; wife and two girls dependent." The answer to the second part of the question is: "They have been deprived;" and to the third, the jury answer that they cannot form a judgment.

Their Lordships scarcely understand on what principle this question should have been put to the jury. The question in the cause was not what damage had been sustained by the plaintiff's wife and children, but what damage had been sustained by himself. If he had been killed, and such an action as that brought under Lord Campbell's Act in this country could be maintained in Canada, then the question would be what damage was sustained by his wife and children. But the jury are further asked, "To what extent in

the future will the wife and children be deprived of his labor?" which seems to mean, "For what time will the wife and children be deprived of his labor?" It *had been origi- [361] nally proposed to put the question in the form: "For what time, under probable circumstances, or in all probability, would they be deprived?" But on the defendant's objection the question stands in its present form, and the jury are required to fix the time when the plaintiff will recover. They declined to do what no witness, medical or otherwise, had attempted, but their Lordships do not therefore infer that when they answer the further question, "Has the plaintiff suffered damages by the said accident, and, if so, to what amount?" they excluded all consideration of future loss. If they had thought that the plaintiff would be disabled for all the rest of his life, in their Lordships' view the damages would be too small; but if they adopted the intermediate view, which seems to be, on the whole, the result of the evidence of the plaintiff's witnesses, medical and otherwise, that the plaintiff had been seriously injured, that he still continued to suffer, that his brain still continued somewhat affected, that he was unable to attend to business, and that it was uncertain whether he would ever recover, although he might recover, their Lordships feel unable to say that the damages given were so excessive as to justify a new trial upon that ground. They observe that the law of Canada, as expressed by Article 446, sect. 11, is not far different from that of this country upon this subject: "If the amount awarded be so small or so excessive that it is evident the jury must have been influenced by improper motives or led into error, then a new trial must be granted." On the whole, their Lordships are by no means satisfied that the damages are of such an excessive character as to show that the jury have been either influenced by improper motives or led into error, and they are of opinion that there ought to be no new trial.

Therefore, their Lordships will humbly advise Her Majesty that the judgment of the Court of Queen's Bench be reversed: that the judgment of the Superior Court of Montreal be affirmed; and that the appellant have the costs of the appeal in Canada and of the appeal to Her Majesty in Council.

Solicitors for appellant: *Simpson, Hammond, Richards & Simpson.*

Solicitors for respondent: *Bischoff, Bompas & Bischoff.*

See 28 Eng. Rep., 847 note.

Within the limit of damages fixed by the statute in actions for death caused by negligence, the jury is neither omnipotent nor left wholly to conjecture. They are required to judge and not merely to guess, and therefore such basis for the facts naturally capable of proof can give, should always be present. It is the duty of the Supreme Court to review such judgment, and to set it aside if it appears excessive or the result of sympathy or prejudice: *Hooghkirk v. D. & H.*, 92 N. Y., 219, reversing on another point 63 How. Pr., 328, 26 Alb. L. J., 73, 28 Hun, 407.

A new trial should be granted where, after taking into consideration deceased's chances of life, state of health, present and probable future income, and all matters material, the damages found by the jury are so large as to be out of proportion to the pecuniary loss which appears to have been suffered by deceased's family: *McLean v. Board, etc.*, 7 Vict. L. R. (Law), 239.

In *Houston, etc., v. Couser*, 57 Texas, 293, a verdict of \$9,000 for damages for the death of a switchman 21 years of age, was set aside as excessive, the court (pp. 304-5) saying:

"Perhaps the nearest measure of damages approximating this reasonable certainty would be such sum as would purchase an annuity, if such security was in the market, equal to the value of the pecuniary aid which the plaintiff would have derived from the deceased, calculated upon the basis of all the facts and circumstances of the particular case reasonably accessible in evidence, and including the probable duration of life, as shown by approved tables.

Although from the necessary uncertainty in the testimony in such cases, the jury must be allowed more than ordinary discretion, yet this discretion as far as possible should be aided by evidence. Otherwise the verdict is not returned as required by their oaths upon the testimony, but upon their individual and perhaps variant and erroneous views, and in regard to which the party may not have been heard in evidence or argument.

The damages being for the pecuniary loss only, the party claiming them should then as a general rule, at least, be required to prove such facts and

circumstances as will enable the jury to return a verdict, based upon their evidence, which would approximate reasonable certainty, and the court to pass advisedly in reviewing this evidence upon motion for a new trial.

This testimony would include the circumstances of the deceased, his occupation, age, health, habits of industry, sobriety and economy, his skill and capacity for business, the amount of his property, his annual earnings, and the probable duration of life: *Pierce on Railroads*, 396; 2 *Thomp. on Neg.*, 1290, both citing numerous authorities in notes.

In the case now before the court, though there was testimony showing that the deceased had at one time contributed some property to the plaintiffs, and had at some time previously to his death thus contributed two-thirds of his wages, yet the plaintiffs did not show his pecuniary circumstances, and what his wages had been or then were, though it was evident that this testimony was easily accessible.

Without such evidence the verdict of the jury could have been but little more than a merely speculative one, and the court had no standard by which to determine its correctness. As presented by the record, considering the other facts and circumstances of the case, there was nothing which would relieve the verdict of the character which the first blush would stamp upon it, that it was greatly excessive and not warranted by the testimony. It should have been set aside by the court and a new trial granted, and a failure to do this was error for which the judgment is reversed."

In the following cases the verdicts were held not to be so large as to require a new trial. Of course each case depends upon all its facts, including many more than those noted below:

For \$5,500 against a physician for tying a ligature around a child's penis instead of the umbilical cord: *Brooke v. Clark*, 57 Tex., 105.

For \$5,000 for railway injuries: *Houston & T. C., etc., v. Boehen*, 57 Tex., 152.

For \$1,525 for such injuries: *Int. etc., v. Stewart*, 57 Tex., 166.

For \$4,500 for libel: *Whiteman v. Leslie*, 54 How., 494.

For \$2,500 for injuries to an arm:

Maloy v. N. Y. Cent., 40 How. Pr., 274.

For \$3,000 for wrongfully excluding a colored woman from a lady's car: Brown v. Memphis, etc., 7 Fed. Reporter, 51.

For \$2,000 on account of injuries received by falling into the hatchway of a vessel: Reiss v. North German, etc., 18 Repr., 104, 11 Fed. Repr., 844.

Of \$250 for false imprisonment: Sorenson v. Dundar, 50 Wisc., 385.

Of \$5,000 for death of an engineer on a vessel: Erwin v. Neversink, 23 Hun, 573.

Of \$10,000 for injuries to a car-coupler: Porter v. Hannibal, etc., 71 Mo., 66.

Of \$1,841.67 for injuries on a highway, breaking plaintiff's leg, etc.: Sheff v. Huntington, 16 W. Va., 307.

Of \$1,500 for injury to one from defective sidewalks: Garlick v. Pella, 53 Iowa, 646, 651.

Of \$500 for injuries from same cause: Lexington v. Auger, 3 Leg. Adviser, 240.

Of \$4,500 for injuries from a pile driver: Shultz v. Chicago, etc., 48 Wisc., 875.

Of \$8,000 for death of a dealer in game and poultry: Cook v. Clay St., etc., 9 Pac. Coast L. J., 605, 60 Cal., 604.

Of £800 for fracture of a thigh: Young v. Glasgow, etc., 20 Scottish Law Repr., 169.

Of £15 for damages to plaintiff for falling into a cellarway: Archibald v. Pruden, 7 Vict. L. R. (Law), 422.

Of \$1,000 for an aggravated assault and battery: Borland v. Barrett, 76 Va., 128.

Of \$1,400 for causing death of a passenger: Chicago, etc., v. Bornfield, 104 Ills., 224.

In the following cases verdicts were set aside as excessive:

For \$1,500 for expelling one from horse cars: Hamilton v. Third Av., 43 How. Pr., 50.

Of £5,000 for death of a railway station agent: McLean v. Board, etc., 7 Vict. L. R. (Law), 239.

Of \$35,000 for railway injuries: L. & N., etc., v. Fox, 11 Bush (Ky.), 495.

Of \$200 for assault and battery: Corcoran v. Harran, 15 Cent. L. J., 29, 12 N.W. Repr., 468, Sup. Court, Wisc.

Of \$1,800 for death of a child: Pennsylvania, etc., v. Lilly, 73 Ind., 252.

Of \$10,000 for injuries to a switchman: A. T., etc., v. Brown, 26 Kans., 443.

Of \$1,000 for carrying a passenger past a railway station. The court said the passenger should have recovered compensation for the inconvenience, loss of time, and labor and expense of travelling back, but was not entitled to recover for anxiety and suspense of mind suffered in consequence of the delay, nor the effects upon her health, nor the danger to which she was exposed in consequence of the train being stopped at her station an insufficient length of time to enable her to get off: Trigg v. St. Louis, etc., 74 Mo., 148.

Of \$1,200 for fraud when that was the sum paid for property worth \$800, since a judgment in accordance with the verdict would leave plaintiff the owner of the property bought: Greenwald v. Rathfon, 84 Ind., 547.

Of \$4,400 for injuries sustained by a switchman: Chicago, etc., v. Amy, 10 Bradw., 210.

Of £300 for slander: Ritchie v. Barton, 17 Scot. L. Repr., 530.

[5 Appeal Cases, 374.]

J.C.*, Feb. 11, 12, 1880.

[PRIVY COUNCIL.]

374] *CHARLES JAMES BARCLAY, *Plaintiff*; and THE
BANK OF NEW SOUTH WALES, *Defendant* (¹).

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Pleading—Plea in Accord and Satisfaction—Demurrer.

To a declaration alleging a breach of an agreement therein set forth, and consequent damage to the plaintiffs, it was pleaded that a certain agreement had been come to between plaintiffs and defendants after disputes had arisen. The plea did not in terms admit or deny the alleged breach; nor did it in terms state that the agreement pleaded had been accepted by the parties in accord and satisfaction of the causes of action alleged in the declaration:

Held, on demurrer, reversing the judgment of the court below, that such plea was bad. It could not be assumed that an agreement, the defendants' version of which was set out in the plea, had been accepted in accord and satisfaction.

APPEAL from an order of the Supreme Court (Hargraves and Faucett, JJ., Martin, C.J., dissenting) (March 10, 1879) that judgment be entered for the respondents upon the appellants' demurrer to the 6th, 7th, 10th, 12th, and 14th pleas, and upon the respondents' demurrers to the appellants' equitable replication to the defendants' 6th, 7th, 10th, and 14th pleas.

The pleas are sufficiently set forth in the judgment of their Lordships. The case is reported in the Supreme Court Reports (N.S.), vol. ii, p. 1.

375] *Mr. *Watkin Williams*, Q.C., and Mr. *John Digby* (Mr. *Julian E. Salomons*, with them), for the appellants, in support of the demurrer and equitable replication, referred to *Lyall v. Edwards* (¹); *Randall v. Roper* (²); *Mayne on Damages* [3d ed.], p. 468, quoting *Story on Agency*, par. 217c; *Bullen and Leake's Pleading* [3d ed.], pp. 478-479; *Payler v. Homersham* (³); *Luce v. Izod* (⁴).

Mr. *Benjamin*, Q.C., and Mr. *J. C. Mathew*, for the respondents, contended that the 6th plea amounted to a plea of accord and satisfaction, and was a good answer to the causes of action to which it was pleaded. The remedy of the

**Present*:—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER,

(¹) Reversing 2 Supreme Court New South Wales.

(²) 4 M. & S., 423.

(³) 6 H. & N., 337.

(⁴) 1 H. & N., 245; S. C., 25 L. J. (Ex.), 307.

(⁵) 27 L. J. (Q.B.) (N.S.), 266.

appellants was under the agreement set out in the plea. As to the equitable replication, no grounds were shown for setting aside unconditionally such agreement, which the parties moreover had acted upon.

Mr. Watkin Williams replied.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER: The plaintiffs in this case are the Commercial Bank in Tasmania, suing by their public officer, and the defendants are the Bank of New South Wales. The questions in this appeal arise solely upon demurrers to pleas and replications, and their Lordships therefore have only to deal with what appears on the face of the pleadings. The first count of the declaration is to this effect: "That one Armstrong had shipped from Hobart Town, in the said colony of Van Diemen's Land, certain goods to Messrs. Brown & Son at Sydney, and had drawn against the same a bill of exchange on the said Messrs. Brown & Son for the sum of £250, and annexed thereto the bill of lading of the said goods, and indorsed the same and the said bill of exchange to the said Commercial Bank, in order to procure an advance by the said bank against and on the security of the said bill of exchange and bill of lading, and retained and employed the said bank for reward to them in that behalf to collect the said bill of exchange, and to receive *payment of the same in Sydney from the said [376 Messrs. Brown & Son, and upon such payment and not otherwise to deliver the said bill of lading to the said Messrs. Brown & Son." Then the plaintiffs aver: "That thereupon, in order to carry out such retainer and employment, the said Commercial Bank indorsed and transmitted to their agents in Sydney (the defendants having notice of the premises) the said bill of lading and bill of exchange, and for reward to the defendants in that behalf retained and employed them to present for acceptance and to collect the said bill of exchange, and to receive payment thereof from the said Messrs. Brown & Son, and upon such payment and not otherwise to deliver the said bill of lading or goods to the said Messrs. Brown & Son, and the defendants received the said bill of lading and bill of exchange, and accepted the said retainer and employment." The declaration avers that all conditions, &c., were performed, and the breach is thus stated: "Yet the defendants, contrary to their agreement and duty in that behalf, without obtaining payment of the said bill of exchange, delivered the said bill of lading to the said Messrs. Brown & Son, whereby they were enabled to and did obtain possession of the said goods with-

out payment of the said bill of exchange, and the same has hence hitherto remained unpaid, and by means of the premises the said goods became wholly lost to the said Commercial Bank and to the said H. F. Armstrong, and the said Commercial Bank incurred divers large costs and expenses in and about defending an action which thereby accrued to the said H. F. Armstrong against the said Commercial Bank, and were compelled to and did pay a large sum to the said H. F. Armstrong as damages sustained by him by reason of the loss of the said goods as aforesaid." There are several other counts, the same substantially as this, having reference to different bills of exchange, and to these counts several pleas were pleaded, that on which the main question has been raised being the sixth plea, pleaded to the first, second, third, fourth, and fifth counts, which runs thus: "The defendants say that after the alleged receipt of the said bills of lading and bills of exchange by the defendants, and the alleged retainer and employment of the defendants as in the said counts respectively mentioned, a dispute arose between 377] the defendants and the said *Commercial Bank"—their Lordships here observe that it is not stated whether the dispute arose before or after the breach complained of—"as to the liability, contingent or otherwise, of the defendants to the said Commercial Bank for any loss which might arise or happen to the said Commercial Bank in respect of the said bills of lading and bills of exchange in the said counts respectively mentioned; and it was thereupon agreed between the defendants and the said Commercial Bank that, in consideration of the defendants crediting the said Commercial Bank with the amount of the said bills of exchange in the said counts respectively mentioned, the said Commercial Bank should transfer to the defendants all their right to the same, and all their remedies thereupon as against the acceptor or drawer, and also all their right to the goods comprised in the said bills of lading, and all their rights and remedies for the recovery of the same, and also all their rights and remedies against the captain and owners of the vessels mentioned in the said bill of lading for non-delivery of the goods comprised therein respectively according to the tenor and effect of the said bills of lading; and the defendants say, that thereupon they did credit and thereby pay to the said Commercial Bank the full amount of the said bills of exchange, and the said Commercial Bank did transfer to the defendants all their rights and remedies as aforesaid, and indorsed the said bills of exchange and bills of lading to the defendants. And the defendants further say, that subse-

quently they, as holders for value of the said bills of exchange, sued the said H. F. Armstrong, as drawer of the said bills of exchange, upon the said bills of exchange in the second, third, fourth, and fifth counts respectively mentioned, and recovered judgment upon the same against him in this honorable court; and thereupon the said H. F. Armstrong sued the said Commercial Bank for the amount paid by him under the said judgment. And the defendants say, that the amount paid by the said Commercial Bank to the said H. F. Armstrong, in settlement of the said action and the costs thereof, are the costs, expenses, and damages referred to in the said counts respectively, and that such costs, expenses, and damages arose in respect of the said bills of exchange so transferred and indorsed to the defendants as aforesaid, and the full amount of which was duly paid to the said Commercial Bank by the defendants in [378 pursuance of the said agreement, and not otherwise.”

This plea was demurred to on the ground that it was not a good plea in accord and satisfaction, or indeed in any other view. Two of the learned judges below have held that it was a good plea in accord and satisfaction. It is true that Mr. Justice Hargrave expresses himself somewhat doubtfully upon this point, and appears to think that possibly it is something more, but perhaps it may be taken that he does not substantially differ from Mr. Justice Faucett, who is of opinion that the plea amounts to a good plea of accord and satisfaction. The Chief Justice is of opinion that the plea is bad. The plea alleges a certain agreement to have been come to between the plaintiffs and defendants after certain disputes arose. In terms it does not admit, nor does it deny, the breach which is alleged in the declaration. It does not in terms state that the agreement set out in the plea was accepted by the parties in accord and satisfaction of the causes of action in the declaration mentioned, but it has been argued that the plea upon the whole of it must be construed as meaning this. It has been also argued that it may be construed in a totally different manner, namely, as substituting an agreement for the original agreement set out in the declaration; but inasmuch as this latter contention has not been insisted upon, their Lordships will confine themselves to considering whether it does amount to a plea in accord and satisfaction.

It appears to their Lordships that the agreement set out in the plea does not necessarily, and on the face of it, amount to an accord and satisfaction; but that it is consistent with this agreement that it may have been come to, and

yet that the plaintiffs may not have intended to accept it in accord and satisfaction of the causes of action stated in the declaration. The only ground on which it can be plausibly argued that the agreement must, on the face of it, be taken to be in accord and satisfaction, is the assumption that in any event the Commercial Bank could not obtain more than the value of the bills of exchange, and that that value is stated to have been paid. But their Lordships are of opinion that it cannot be taken, upon the proper construction of the counts to which the plea is pleaded, that no damages 379] could have *arisen from the breach of contract on the part of the defendants beyond the sum of money for which the bills were drawn, although it may possibly be that no greater damages may be given in the trial by a jury. It appears to their Lordships impossible to say, as a matter of law, that in consequence of the defendants' breach of this agreement, admitted as it is by the plea, in allowing Brown & Co. to obtain possession of the goods without payment of the bills of exchange, no further damage can have accrued to the plaintiffs than the mere value of the bills of exchange. That being so, the agreement, on the face of it, does not appear to be an agreement necessarily in accord and satisfaction. Undoubtedly it might have been accepted in accord and satisfaction; but there is no allegation in the plea that it was so accepted, and their Lordships cannot help thinking that the allegation is purposely omitted—at all events, it cannot be imported into the plea.

Their Lordships must observe that they cannot agree with the view expressed by Mr. Justice Faucett, who observes: "I at first thought that this plea did not amount to a plea of accord and satisfaction, because it contained no express statement to that effect, and therefore that it went merely to damages. But, as the whole matter rested on written communications, I think the effect of these written communications has been properly left to be determined by the court." It appears to their Lordships that such is not the effect of the plea. It does not set out written communications the effect of which may be determined by the court. It sets out no written communications at all, but professes only to give the defendants' version of a certain agreement which the plea does not even aver to have been in writing. If the letters which constituted the agreement had been set out, it might have appeared on the face of them that they constituted an agreement which might be taken as one in accord and satisfaction; but inasmuch as they have not been set out, that cannot be assumed.

On these grounds, their Lordships are of opinion that this plea is bad. It has been admitted on both sides that there is substantially little distinction between the first count and the second, third, fourth, and fifth counts, and that the seventh and tenth *pleas substantially stand or fall [380 by the argument in support of or against the sixth plea. The same appears to their Lordships substantially to be the case with respect to the fourteenth plea, which is pleaded to the eighth count. The demurrer on the twelfth plea has been abandoned, and the matter therefore stands thus: that in their Lordships' view the judgment appealed against is wrong, in as far as it directs that judgment be entered for the defendants upon the plaintiffs' demurrers to the defendants' sixth, seventh, tenth, and fourteenth pleas; and that such judgment should be entered for the plaintiffs.

That being so, no question arises with regard to the replication of the plaintiffs, which is also demurred to on the part of the defendants, and in respect of which it follows that the plaintiffs would be entitled to judgment.

For these reasons, their Lordships will humbly advise Her Majesty that the judgment below be reversed as far as it relates to entering the judgment for the defendants upon the demurrers to the sixth, seventh, tenth, and fourteenth pleas, and also upon the demurrer to the plaintiffs' replication to the sixth, seventh, tenth, and fourteenth pleas, and that the judgment be entered for the plaintiffs upon those pleas, and the replication to them; the costs, as usual, to follow the result.

Solicitors for appellants: *Henry Kimber & Co.*

Solicitors for respondents: *Waltons, Bubb & Walton.*

[5 Appeal Cases, 381.]

J.C., * Feb. 12, 13, 14, 17, 18, 26, 1880.

[PRIVY COUNCIL]

381] *OCTAVE BOURGOIN and Others, *Appellants*; and LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA, ET OCCIDENTAL, THE ATTORNEY-GENERAL (intervening party), THE ATTORNEY-GENERAL (opposant), LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA, ET OCCIDENTAL, *Respondents*.

FOUR CONSOLIDATED APPEALS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, IN THE DOMINION OF CANADA.

Railway Act, 1868—Validity of Award—Compensation—Invalid Transfer by Railway Company—Quebec Act, 39 Vict. c. 2—Power of Provincial Legislature.

Held, that an award made under "The Railway Act, 1868," awarding to the respondent railway company as damages for expropriated land "the sum of \$35,013 plus \$100 per month from this date, payable on the first of each month until the said company shall have set free the watercourse serving to drain the quarries adjacent to the expropriated land and constructed a culvert to protect the said watercourse," is invalid upon the face of it, in respect of the monthly payment directed, which is not rent, but in the nature of an assessment of damages payable *in futuro*, contingent on a future event and therefore uncertain; and also in respect of the direction to construct a culvert, which was not within the functions of the arbitrators.

Under the act it is not competent to the arbitrators to impose the payment of a rent or periodical sum at all. Their duty is, except when the parties expropriated fall within the description of "corporations or persons who cannot in common course of law sell or alienate the lands set out and ascertained," to fix as compensation such a gross sum or sums as would be capable of being paid or tendered at once to the 382] parties entitled to the same *under sub-sect. 27, or into court under sub-sect. 34 of sect. 9 of the act, in order to entitle the company to possession under the 27th, or to confirmation of title under the 34th and 35th sub-sections.

By a deed (16th of November, 1875) the respondent company, which had been originally incorporated under Quebec Act 32 Vict. c. 55, but which was subsequently declared a federal railway by Canadian Act 36 Vict. c. 82, and became subject to Canadian Railway Act, 1868, purported to transfer such federal railway with all its appurtenances and all its property, liabilities, rights, and powers to the Quebec Government, and agreed to dissolve itself as soon as such transfer should be perfected.

By Quebec Act 39 Vict. c. 2, such transfer was confirmed, the enterprise of the respondent company was combined with that of another company which had made a similar transfer to the government, the respondent company was dissolved, and its property vested in a new company with a new title and a different organization, which was thereby declared to be subject to provincial legislation:

Held, that both the deed and the enactment 39 Vict. c. 2, were invalid, and inoperative to affect the obligations of the company.

Such a transfer is *ultra vires* a railway company, by the law of the province of

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Quebec as defined by Art. 369 of the Civil Code; and by the special legislation affecting the respondent company, read in connection with the British North America Act, 1867, sect. 91 and sect. 92, sub-sect. 10, the same could not be validated to all intents and purposes by an act of the provincial legislature. An act of the Parliament of Canada was essential in order to give to such transfer full force and effect; whatever may have been the inchoate rights created thereby as between the parties thereto.

[5 Appeal Cases, 425.]

H.L.(E.), May 4, 1880.

[HOUSE OF LORDS.]

***THE DIRECTORS, &C., METROPOLITAN DISTRICT RAIL- [425
WAY COMPANY, *Appellants*; and CHARLOTTE SHARPE,
Respondent (').**

Lands Clauses Act—Special Act—Arbitration—Costs, Action for, before Taxation.

The Lands Clauses Consolidation Act, 1845, contained special provisions with regard to claims for compensation for lands affected by the works of a railway, and directed that (except in certain specified cases) compensation should be awarded with costs. A special act (38 & 39 Vict. c. ccviii.) declared that the provisions of the general act were, "except where expressly varied by the special act," incorporated with it. The general act provided the forms of proceedings in arbitrations—such as the appointment of arbitrators by the contending parties, and the appointment of an umpire by the arbitrators, and declared that compensation might be recovered with costs. The special act directed that arbitrations conducted under its provisions should be conducted by an arbitrator appointed by the Board of Trade, but contained no specific directions as to the award of costs. An arbitration of this sort took place under the special act. The arbitrator awarded compensation, but said nothing as to costs:

Held, that the claimant was entitled to costs, for that the substitution of one form of proceeding in the arbitration different from that in the general statute, expressly varied the provisions of the general statute as to that matter, but did not repeal the provision as to costs in the general statute, nor affect the general rule that the party succeeding in such an arbitration should recover costs:

Held, also, that the right to costs was entirely independent of the taxation of them, and an action could be maintained for the costs though the amount of such costs had not been previously settled or ascertained by taxation; and consequently an order for the taxation made by the learned judge on giving his judgment for the plaintiff, was a valid order.

Holdsworth v. Wilson (*) approved.

Per THE LORD CHANCELLOR (Lord Selborne): In construing acts of Parliament of this kind, and adjusting the general provisions in the general act to the particular provisions of the special act, considerations of reason and justice and the universal analogy of such provisions in similar acts of Parliament, ought to have much weight and force.

(') Affirming 4 Q. B. Div., 645.

(*) 4 B. & S., 1.

[5 Appeal Cases, 447.]

H.L. (L.), May 11, 13, 1880.

[HOUSE OF LORDS.]

447] *THOMAS CLIFFORD and CAROLINE BROOKE CLIFFORD, Appellants; and HEBER KOE, Respondent (*).*Gift to A. and Children—Power of Appointment—Wild's Case (6 Co. Rep., 17).*

The rule in *Wild's Case* (*), even if only a rule of construction, is not now to be departed from.

It is consistent with that case that the primary sense of the word "children" is issue of the first generation. That primary sense is displaced when circumstances render the rule in *Wild's Case* (*) applicable, on which the word becomes a word of limitation and not of purchase.

A testator by a will made in 1823 gave "the whole of my landed property situate, &c., to my eldest son H. W. and to his children lawfully begotten. In case of his dying without issue male or female I give the same landed property to my second son C. In case of C. dying without children or child lawfully begotten, I give the same landed property to my daughter Harriet and to her child or children lawfully begotten; and, should she have no children, she shall have a power of bequeathing it to whomever she pleases. I do hereby give and leave a full discretionary power to each of my children arriving at the possession of this landed property, to dispose of it by their will and testament to one, or to each, of their children, in such manner and in such proportions as to each of them, my children, shall seem meet and right and proper. My reason for this is that as there is a title of baronet in the family the eldest son ought to possess something more than the others, and also that I never wished to encourage disobedient children, therefore I leave the power of punishing or rewarding, as each of them coming into possession of the property, and having children, shall think right."

H. W. never had a child. C. died during the life of his elder brother, but left a daughter. H. W. after entering into possession, disentailed the estate, and devised it to his wife's nephew:

Held, that H. W., by virtue of the rule in *Wild's Case*, took an estate tail under the will; that the existence of the power did not affect the application of the rule, nor was it affected by the use of the word "children"—in one instance applicable to the sons and daughter of the testator, and in the other instance meaning their sons and daughters.

Seale v. Barter (*) approved.

APPEAL against a decision of the Court of Appeal in Ireland, which had affirmed a previous decision of the Court of Queen's Bench there (*).

448] *Sir J. Brooke, who was seised of certain estates in the county of Tipperary, made his will dated in January, 1823, and thereby devised as follows: "I give and bequeath the whole of my landed property, situated in the county of Tipperary, in Ireland, after my death, to my eldest son Henry Warren Brooke and to his children lawfully

(1) Affirming Irish Rep., 10 C. L., 179; (4) Ir. Rep., Com. Law Ser., vol. x, p. L. R., 2 Ir., 184. 179; Law Rep., Ir. Com. Law vol. i, p. 184.

(2) 6 Co. Rep., 17.

(3) 2 B. & P., 485.

begotten, without any reservation or prevarication whatever. In case of his (my eldest son Henry Warren Brooke) dying without issue male or female, I give and bequeath the same landed property to my second son Charles A. Brooke and to his children lawfully begotten. In case of his (my second son Charles A. Brooke) dying without children or child lawfully begotten, I give and devise the same landed property to my daughter Harriet Louisa and to her child or children lawfully begotten, and should she have no children she may and shall have a power of bequeathing it to whom-ever she pleases. I do hereby give and leave a full discretionary power to each of my children arriving at the possession of this landed property, to dispose of it by their will and testament to one or to each of their children (should they have any lawfully begotten) in such manner and in such proportions as to each of them, my children, shall seem meet and right and proper. My reason for this is that I think it is right, as there is a title of baronet in the family, the eldest son ought to possess something more than the others, and also that I never wish to encourage disobedient children, therefore I leave the power of punishing or rewarding as each of them coming into possession of the property and having children shall think right."

The testator died on the 6th of February, 1841, leaving the three children named in his will him surviving. The eldest son Henry Brooke Warren entered into possession of the property. He was married, but never had a child. The second son, Charles Augustus Warren, died in January, 1859, during the lifetime of his elder brother, but left a daughter, Caroline Augusta Brooke, who had since become the wife of Mr. Clifford, and was now one of the appellants. While Sir Henry Warren Brooke was in possession of the estate he executed a disentailing deed, and on the 21st of May, 1855, made a will in which he recited that he had "lately sold and conveyed the estate, subject to the joint lives of *myself and my wife, Dame Elizabeth Brooke, [449 and the life of the survivor of us, to my nephew by marriage, John Heber Pemberton Koe," and he then gave and bequeathed to his wife all his real and personal estate for life, and appointed her his executrix. He died in December, 1859. His widow entered into possession of the estates. The right of Sir Henry Warren Brooke to disentail the estates and absolutely dispose of them being disputed, Mr. Clifford and his wife, in May, 1873, brought an action of ejectment against Lady Brooke and Mr. Koe. The facts were by agreement turned into a special case, on which, in

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Clifford v. Koe.

H.L. (1)

February, 1876, judgment was given for the defendants. This judgment was afterwards affirmed in the full Court of Appeal. This appeal was then brought.

Mr. *Joshua Williams*, Q.C., Mr. *Madden*, Q.C. (of the Irish bar), and Mr. *Spencer Butler*, for the appellants: Upon the true construction of this will no power was given to the first taker to put an end to all the estates subsequent to his own, and by a disentailing deed to vest all the property in himself. The eldest son was desired to be favored, but was not intended to be made absolute master of the property. He had but an estate for life, with a power, a specially framed power, to appoint among his children. He had no child, and therefore on his death the estates went over to the second son. The court below in holding that he had an estate tail, proceeded on the authority of *Wild's Case* (¹), but that case is inapplicable here, for a limited estate was alone vested in him, and the power to dispose of the estate never arose, the intention of the testator plainly being that there should be no power of disposition over the estate, except in favor of the children of the possessor for the time being of the estate. The rule in that case has in many instances been recognized not as a rule of law, but as a rule of construction, and is always subject to the intention of the testator. Here that intention is clear. The testator meant that all the contingencies of children in the cases of the three successive possessors of the estate should be exhausted before the estate was disposed of, except in the way 450] mentioned in the will. The children of *each possessor in succession were to take on the death of that possessor. If the first had no children the estate went over to the next devisee for life, and after his life estate to his children, and if no one of the three successive possessors had children the last of the three was to have a general power of disposition. That last provision was a strong evidence of what was the intention of the testator. That power, a general power of disposition, was given to the testator's daughter, but it was only to be exercised after it was known that she had no children,—the hopes of children from the eldest and second son and from the daughter being entirely exhausted,—then, but not till then, could the estate be disposed of otherwise than as the testator had marked out. [LORD BLACKBURN: But the devise to the eldest son contains the word "issue." Do you say that children may mean issue, but that issue must mean children?] That must be the construction in this will. It would be so even

(¹) 6 Co. Rep., 17.

with respect to the word "issue" itself alone used. In *Hockley v. Mawbey* (1) the gift was to A. for life, and after his decease to his son R. and his issue lawfully begotten, to be divided among them as R. should think fit, and in case he should die without issue, over. Lord Thurlow held that R. took only an estate for life, and that issue there was to be treated as meaning children, "for he meant they should take distributively." The same was held in *Bradley v. Cartwright* (2) and *Eastwood v. Avison* (3), in both of which cases the word "issue" was treated as "children;" the first taker took an estate for life only. In *Grieve v. Grieve* (4) the contention was that the rule in *Wild's Case* (5) applied, and that an estate tail would have been taken in the house devised to the nieces, but, there being a gift of the furniture to go with the house, it was held that they took only for life, with immediate remainders to the children. Here there is a gift of personalty and the same rule must be applied. The intention of the testator rendered the rule in *Wild's Case* (6) inapplicable. And even in *Seale v. Barter* (7) if it had not been for the peculiar form of the codicil, which was treated not as a codicil but as the substantive will, and was construed independently of the original will, devises such as are found *here would have been held to give only [45] an estate for life. The decision there may therefore be referred to the peculiar circumstances of the devise. So in *Roddy v. Fitzgerald* (8) the will itself plainly pointed to the two devisees taking respectively estates tail, for the gift was to each of them, with an immediate and unlimited power of appointment, and the very intention of the testator would have been defeated had they not taken such estates. In the opinions delivered there, and in the judgments, the rule in *Wild's Case* (9) was treated as not universally applicable. And where, as in *Kavanagh v. Morland* (10), words of distribution, together with words which carry an estate in fee, are attached to the gift to the issue, the ancestor takes for life only. That is so here. In *Morse v. Morse* (11) the testator gave a fund to his daughter and her children, and appointed A. B. trustee for the daughter and children, and it was held that the money was given in trust for the daughter for her life, and after her decease for her children.

In *Jeffery v. Vitre* (12) a bequest to a woman for the benefit of herself and such children as she then had, or there-

(1) 1 Ves. Jun., 143; 8 Bro. C. C., 82.

(2) Law Rep., 2 C. P., 511.

(3) Law Rep., 4 Ex., 141.

(4) Law Rep., 4 Eq., 180.

(5) 6 Co. Rep., 17.

(6) 2 B. & P., 485.

(7) 6 H. L. C., 828.

(8) Kay, 16; 28 L. J. (Ch.), 41.

(9) 2 Sim. 425.

(10) 24 Beav., 296.

after might have, by her then husband, was held to give only an estate for life, with remainder to the children. In *Audsley v. Horn* (1) the same rule was applied. The word used in the dispositive part of this will is "children," and in *Byng v. Byng* (2) it was held that that word was a word of flexible meaning, and that a gift "for my niece, M. A. B., and her children" (M. A. B. was at the date of the will unmarried) must there be held as a word of limitation, so that the after-born son of the niece took an estate tail in the devised property, and Lord Cranworth there spoke (3) of the rule in *Wild's Case* (4) being made "to bend to an intention collected from other parts of the will." The primary meaning of the word "children" itself is that it means immediate children; all cases show that; but whether one word or the other is used, the whole context of the will is to be considered, and the context here shows that the intention was only to grant a life estate to each of the persons specially named in the will.

452] **Montgomery v. Montgomery* (5), *Buffar v. Bradford* (6), *Robinson v. Robinson* (7), *Heron v. Stokes* (8), *Rowland v. Morgan* (9), *Doe v. Burnsall* (10), *Merest v. James* (11), *Broadhurst v. Morris* (12), 2 Jarm., 366, n., and *Jesson v. Wright* (13), were also cited and commented on.

Mr. Dacey, Q.C., and Mr. R. J. Robertson (of the Irish bar) were for the respondents, but were not called on to address the House.

THE LORD CHANCELLOR (Lord Selborne): My Lords, this case has been very ably and very zealously argued by both the learned counsel who have addressed your Lordships; but after hearing their arguments, I think your Lordships will have no difficulty in agreeing with the unanimous judgment of the two courts below, each consisting of four learned judges, among whom there was no difference of opinion.

The case was considered by them to fall within the rule well known as the rule in *Wild's Case* (14), applicable when there is a gift to parent and children, under which, *prima facie*, they would take concurrently, there being then no children in existence. It has been said that this is a rule of construction, not of law; but, as a rule of construction, it

(1) 26 Beav., 195; affirmed in 1 De G. F. & J., 226.

(2) 10 H. L. C., 171.

(3) At p. 180.

(4) 6 Co. Rep., 17.

(5) 3 J. & Lat., 47; 8 Ir. Eq. Rep., 740.

(6) 2 Atk., 220.

(7) 1 Burr., 38.

(8) 2 Dr. & War., 89.

(9) 2 Phill., 764.

(10) 6 T. R., 30.

(11) 1 Br. & Bi., 484.

(12) 2 B. & Ad., 1.

(13) 2 Bli., 1.

has been law from the time of Lord Coke to the present day ; and though the reasons on which it was originally founded may have been sometimes criticised, it has been uniformly followed in cases falling properly within its scope. Your Lordships, I am satisfied, will not think yourselves at liberty to depart, in any such case, from such a rule of construction so long ago established and so constantly followed.

My Lords, it is true, and it is perfectly consistent with *Wild's Case* (¹), that the primary sense of the word "children" is issue of the first generation ; and this primary sense ought to be adhered to when there is nothing to displace it. But it is displaced by the *rule in *Wild's Case* (¹) whenever the circumstances occur in which that rule is applicable ; and the word "children" then becomes and is to be construed as, a word of limitation, and not of purchase. The reasons for the rule, even if they were more open to criticism than it is necessary at present to assume, are admitted to be such as would apply in the case before your Lordships, unless the power which follows the principal words of disposition, is sufficient to exclude them. There can be no doubt that, if upon the face of this will you found a context excluding the operation of the rule, it would be excluded ; but if, in the whole dispositive portion of the will you have nothing more than what the rule itself assumes, nothing which does not fall strictly within the terms of the rule, then I apprehend you must, *prima facie*, construe that dispositive part of the will according to the rule, and the burden lies upon those who deny its application to show that elsewhere in the will something is found inconsistent with it.

Approaching in this manner the terms of this particular will, it seems to me, and I think it will appear to your Lordships, to be clear beyond reasonable controversy that the rule would apply if there were not the power, on which, in the argument, the principal reliance has been placed. The will begins with words which, I agree, are sufficient to carry the fee, although they are connected with terms of local description. But to whom, my Lords, would they carry the fee ? To Henry Warren and his children lawfully begotten. According to the rule in *Wild's Case* (¹), if there had been children then in existence capable of taking at once concurrently with their parent, then under those terms a fee simple would have been taken by the parent and the children concurrently, as joint tenants ; but if there were not children in existence who could take concurrently with

(¹) 6 Co. Rep., 17.

the parent, then the fee is taken by the parent, and by the children in succession after him, as tenants in tail; the parent taking a fee tail in the first instance and transmitting it according to the law of descent to all his issue until they are exhausted. Therefore, if it rested solely upon those first words, there could have been no doubt of the application both of the rule and of the reasons for the rule; for in this case there were no children.

454] *Well, the will goes on: "In case of his, my eldest son, Henry Warren, dying without issue male or female," then there is a gift over. I pause there to say that, unless you start with a construction of the word "children" inconsistent with the rule in *Wild's Case* (¹), these words which follow, instead of repelling, fortify the application of that rule; because the words "dying without issue male or female" are properly coincident with the duration of an estate tail; for though it is true that, if a particular description of issue had been previously mentioned who would take the fee, those words might mean dying without such issue, yet, on the other hand, they signify a total failure of issue of all generations in their primary and natural sense.

Then, what is the gift over? The same "landed property," again carrying the fee, is given, not to the children of Charles, but to Charles and his children lawfully begotten, precisely in the same manner. And then, if Charles should die "without children or child lawfully begotten," there is a gift over to "Harriet Louisa and to her child or children lawfully begotten," again of the same landed property, again carrying the fee in exactly the same manner. All that is perfectly intelligible and capable of operation in the ordinary course of settlement, so as to carry the inheritance in a succession of estates tail through all these lines, subject to the legal incidents of an estate tail; not Henry, nor Charles, nor Harriet, having then had children. Your Lordships will not, I think, in this case depart from the principle that a court of justice ought not to refuse to give their proper interpretation to words which create a series of estates tail, merely because the law says that the taker of an estate tail may bar it, so as to prevent the succession from going farther than himself. The words which follow, "and should she have no children she may and shall have a power of bequeathing it to whomsoever she pleases," deal with the ultimate remainder, giving an absolute power of testamentary disposition to the person who,

(¹) 6 Co. Rep., 17

in that case, would be the last tenant in tail. All this is consistent with the rule. There is not a single word, so far, which points to anything that would not fall within the rule; and in truth, when you have regard to the fact that the words which here carry the fee *are, in no part [455 of that series of limitations, more connected with the gift to the issue than they are with the gift to the parent, I apprehend that the rule is applicable in this case more easily, and with greater conformity to the apparent intention of the testator, than in some of the cases to which it has been applied.

Now, my Lords, I will ask your Lordships to compare with that construction, resulting from the rule, the consequences which would follow (even before we come to consider the power) from the construction insisted upon by the appellants. The appellants require you arbitrarily to sever the application of the words which pass the fee, and which, on the face of the will, are, in each of the steps of this series of limitations, equally applicable to the parent and to the children; you are arbitrarily to sever these words from the parent, to deprive them of all their force as to him, and to give them force only by way of remainder to the children. That is the first step. It was sought to be justified by some authorities relating to gifts of personal estate only. In such cases there is an obvious reason why, on similar words, you might arrive at such a construction, namely, that it is the only way by which the children can take anything. But here the children may take, *per formam doni*, as heirs in tail; they are provided for without departing from the established construction of the words, which words give the same estate of inheritance to the parent as to the child.

The next consequence which would follow from the appellant's argument is this; that having arrived at that point, having reduced the parents to tenants for life, and having given the fee to the children, the children would take that fee as joint tenants; so that, if there should have been no severance, an eldest son, dying in his father's lifetime, would (as far as this disposition goes), be entirely excluded, although he might leave issue, which issue might last for many generations. When we come to the power and the reasons for it, we find that, according to the same construction, nothing could be appointed to a grandchild, even though he might be the baronet (a dignity in the family, of which the testator takes notice), and the head of the family. These, my Lords, are certainly not reasons for departing, in this

instance, from the rule in *Wild's Case* (*). It may be convenient in this *place to take notice of the argument which was founded upon some passages in the opinions delivered in this House in *Roddy v. Fitzgerald* (*) and in *Kavanagh v. Morland* (*) the case before Vice Chancellor Wood, which is there referred to. In the opinion given by Mr. Justice Vaughan Williams (*), this is said: "I do not propose to controvert the general proposition laid down in Mr. Jarman's Treatise on Wills, and supported by the opinion expressed by Vice-Chancellor Wood in *Kavanagh v. Morland* (*), namely, that 'where words of distribution, together with words that carry an estate in fee, are attached to the gift to the issue, the ancestor takes for life only.'" The same doctrine, almost in the same words, is repeated in the judgment of Lord Cranworth (*); and in that of Lord Wensleydale (*) it is a little expanded. Lord Wensleydale says, "I agree with the opinion so clearly expressed by Mr. Justice Williams upon this point; and I think, with him, that it is quite unnecessary to question the opinion of Vice-Chancellor Wood in *Kavanagh v. Morland* (*), and the opinion expressed in Mr. Jarman's work on Wills, that when words of distribution, together with words which would carry an estate in fee, are attached to the gift to the issue, the ancestor takes for life only, and that, whether the fee be given by the technical word 'heirs,' or by the word 'estate,' occurring in the description of the subject of the gift, and whether the gift to issue be direct, or by implication from the power to appoint to them, and whether there is a gift over on a general failure of issue of the ancestor or not."

My Lords, it was argued that because the word "property" here would carry the fee, and for a reason connected with the power, which I shall come to observe upon afterwards, the principle so laid down in *Kavanagh v. Morland* (*) and in Jarman's work on Wills, was applicable here. But the answer to that is, that there are here no words of distribution, but on the contrary, the issue, if they took as purchasers, would take as joint tenants and not as tenants in common; and there are here no words which would carry [457] an estate in fee, "attached to the gift to the *issue." The words which would carry an estate in fee are attached to the gift to the parent and the children indiscriminately. Therefore both these elements are entirely absent in this portion of the will, and I think it will presently be seen

(*) 6 Co. Rep., 17.

(*) 6 H. L. C., 823.

(*) Kay, 16; 23 L. J. (Ch.), 41.

(*) 6 H. L. C., at p. 862.

(*) Ibid, at pp. 871-874.

(*) Ibid, at p. 883.

that neither of them can be inferred from that which follows, namely, the power of appointment.

Now with regard to that power: the testator having so disposed of (and according to the rule in *Wild's Case*(¹) and even according to the arguments of the appellants at the bar, having made a complete disposition of) the whole fee simple of his estate, because by *Wild's Case*(¹) it is carried through a series of estates tail, followed by a power over the reversion in fee simple, and according to the argument at the bar it is carried through a succession of life estates, followed in each case by estates in fee simple,—this power which follows is manifestly not necessary, and cannot be assumed to be given to supply a gap or deficiency in that series of limitations. My Lords, it appears to me, that it is a power and nothing more; a power, in default of the execution of which, your Lordships cannot imply any gift to the objects of the power; because those gifts have been previously made in the dispositive part of the will by the testator himself, who has exhausted everything, unless the power is so exercised as to displace any of the dispositions he has made, either partially or wholly.

Well, then, what is the power? “I do hereby give and leave a full discretionary power to each of my children arriving at the possession of this landed property, to dispose of it by their will and testament to one or to each of their children (should they have any lawfully begotten) in such manner and in such proportions as to each of them my own children shall seem meet and right and proper.” He adds a reason which I will presently refer to.

Two arguments have been founded upon that power—one broadly and generally, that the fact of there being such an indication of succession in the will excludes the reason for the rule in *Wild's Case*(¹); the other that the word “children” is in that part of the will used in its primary sense, and must, therefore, exclude in the earlier dispositive part the larger sense, equivalent to “issue,” which the rule in *Wild's Case*(¹) would impose upon it. *The first of [458 those two arguments is inconsistent with the principle of *Wild's Case*(¹) itself, and also with the decisions which have followed upon it. In *Wild's Case*(¹) the very point which the rule settles is that there is succession, not that there is no succession of interests: that in a case where children are not in existence so as to take concurrently with their parent, the gift is a gift of estates tail in which the children can take and will take only by way of succession to their parent. A

(¹) 6 Co. Rep., 17.

power, therefore, which contemplates that very state of things, which contemplates that the parent will remain in possession until his death, and that any control over the succession which is given to him may be exercised by his will, is not only not repugnant to the rule in *Wild's Case* (1), but is most plainly consistent with it.

With regard to the authorities, the case of *Seale v. Barter* (2) is a direct and positive authority to the effect, that in a will, for this purpose precisely like the present, where the word was "children," and where the construction would otherwise have depended upon the rule in *Wild's Case* (1), that rule was not excluded by a power of the same nature and character.

And, my Lords, I think it is clear that the reason why the cases of *Jesson v. Wright* (3) and *Roddy v. Fitzgerald* (4) were referred to in the court below was, that in both those cases, which in their other circumstances were infinitely stronger in favor of a mere estate for life being taken by the parent, it was held that a power of distribution among children or issue, whether coextensive or not coextensive with the persons who might take under the estate tail, did not prevent the first taker, who was also the donee of the power, from taking an estate tail. Your Lordships will remember that, both in *Roddy v. Fitzgerald* and in *Jesson v. Wright*, the scheme of the will was this: an estate was given to the parent, expressly and in terms, for life, with a power to him to appoint among his issue or "heirs of his body," and with remainder in default of appointment to "issue" in the one case, and to "heirs of the body" in the other; so that, as far as the intention apparent from the natural sense of the testator's words went, you had, in both those cases, circumstances in favor of giving the parent an estate for life only, infinitely stronger than any you have here. The first and the larger argument, that the mere existence of such a power as this is inconsistent with the application of the rule in *Wild's Case* (1), is therefore clearly displaced.

The other argument was, I must say, urged with great force and ingenuity, and it made more impression on me than anything else which was said by the learned counsel for the appellants. It was insisted that the word "children" occurring here, placed a limited sense upon that expression wherever occurring in the will, on the ground that you ought, if possible, to give to the same word in a will the same

(1) 6 Co. Rep., 17.

(2) 2 B. & P., 485.

(3) 2 Bl., 1.

(4) 6 H. L. C., 823.

sense throughout. Well, my Lords, that, like many other such canons of construction expressed in general terms, is very far from universal, and will always require a good deal of care in the application of it to particular wills. In this very sentence I cannot at all accede to the view that because, when the testator speaks of "his own children," the donees of the power, he certainly means his sons and daughters, he must necessarily mean sons and daughters only by the same word when used to describe the objects of the power. I see no necessity for any such conclusion; for the larger includes the narrower sense. I do not, therefore, feel compelled to inquire whether the application of the rule in *Wild's Case* ⁽¹⁾ to the dispositive words of this will, would have been displaced by any inference from this power, if the power itself had been clearly and unequivocally confined to children of the first generation; because I cannot, without reasoning in a circle, restrict the objects of the power, described as "one or each of their children," to children of the first generation, if, in the earlier part of the will, the same word ought otherwise to have been understood as a word of limitation extending to remoter issue. My view is, that your Lordships should first endeavor to ascertain what is the proper construction of the dispositive words of the will, and not overrule that construction by anything which follows, which does not necessarily require a different interpretation. The later clause may as properly receive light from the earlier, as the earlier from the later. I therefore should have been inclined to think, apart from authority, that it was by no means to be assumed that the word "children" here, as descriptive of the objects of the power, *might not extend to all persons who accord- [460 ing to the true interpretation of the dispositive part of the will (if it stood alone) would have come within the description of children. And it seems to me that the case of *Seale v. Barter* ⁽²⁾ is not distinguishable from the present on any satisfactory grounds as to that point. True it is, that there the power was for the testator's son, "to settle the same or any part or parts thereof by will or otherwise on them or any of them as he shall think proper." But to whom did the word "them" refer? The previous words were, "My son, John Seale, and his children lawfully to be begotten." Surely, my Lords, there is no difference between "them," as applied to that antecedent, and the words "his children lawfully to be begotten" if they had been there repeated; and if that is a correct observation upon *Seale v. Barter*, we have

(1) 6 Co. Rep., 17.

(2) 2 B. & P., 485.

no difference really here, except that what was there expressed by reference is here expressed by repetition. I think, my Lords, that is not a sufficient distinction.

I am confirmed in that view by what follows in this will; because the testator, having introduced this power to vary the effect of the previous disposition of the will, says, "My reason for this is that I think it right, as there is a title of baronet in the family, the eldest son ought to possess something more than the others, and also that I never wish to encourage disobedient children, therefore I leave this power of punishing or rewarding, as each of them coming into possession of the property and having children, shall deem right." My Lords, that view of the testator's wish and opinion, that it is desirable that the eldest son, succeeding to the title of baronet, should on that account possess something more than the others, goes far to repel the notion that he could possibly intend to make a disposition by which, if the eldest son of any donee of the power should die in his father's lifetime, leaving a son who would immediately on his death succeed to that title, that grandson, being the baronet, should be absolutely and necessarily excluded from all interest in this estate, unless his father should, before his death have severed his share, which (according to the interpretation of the appellants) might be a very small share, and at all events not more than that of every one of his brothers and sisters, from the rest. Not only would the testator have given the *grandson nothing in that case, but the testator would have given no power to the grandfather to give anything to the grandson, so becoming the head of the family, and succeeding to the title of baronet.

The plain meaning of the testator seems to me to be this: First of all I think it right that the eldest son who will be the baronet should have more than the others, and I have myself made a disposition under which, if it is not disturbed by any exercise of the power, he will take the whole estate. But I also think it right that his parent should have some kind of control, and should be able to reward or punish obedience or disobedience, and also (though this, perhaps, is not expressed quite so clearly), that he should be able to make some provision for younger children. I, therefore, allow him to modify my own disposition under which the whole would go to the head of the family; I allow him, if he pleases, to give some part of the estate to the others; and I also allow him, if he pleases, to disinherit the future head of the family in case of his misconduct or disobedience. For these reasons, my Lords, it appears to me not only that

he had no intention inconsistent with the application of the rule in *Wild's Case* ⁽¹⁾, but that, in some events which might happen, he has expressed a purpose which the application of that rule would rather facilitate than otherwise.

My Lords, I do not think it necessary to detain your Lordships by any observations upon the other cases which were urged at the bar as having some bearing upon the present, farther than to say with regard to one of them, *Eastwood v. Avison* ⁽²⁾, that it appears to me to turn entirely upon the very different words of the particular will there under construction; and, with regard to the case before Vice-Chancellor Malins ⁽³⁾, that, if it really did turn upon the mere fact that by the same words real estate was given and certain articles of furniture annexed to it as heirlooms, I should hesitate long before I came to the conclusion, that the real estate ought not to go in the manner which rules of construction properly applicable to real estate would have determined, only because, according to that construction, those heirlooms would have vested *absolutely in the [462 first tenant in tail. But it is quite unnecessary to consider that; that case is not before your Lordships; if it were, it is very possible that it might be found to contain other grounds for the decision, sufficient to distinguish it altogether from the case now under consideration.

I will not detain your Lordships by any farther observations. I propose that you should affirm the judgment of the court below and dismiss this appeal with costs.

LORD HATHERLEY: My Lords, I have come to the same conclusion, and I have so very often, at different periods of my judicial career, had to consider this class of cases, that I do not think it necessary to enter into detail on the present occasion, more especially having regard to the very full and exhaustive opinion to which we have just now listened.

I apprehend my Lords, that a court of justice in endeavoring to ascertain the intention of a testator in a will which may admit, when brought into contact with the surrounding facts, of some doubt and difficulty, will always do two things. In the first place it will do what is somewhat quaintly called place itself in the testator's arm-chair, that is to say, it will see what was the existing state of the family and of everything connected with the property which may have a bearing upon the subject, and then consider the words of the bequest. And in the second place it will consider whether or not those are such words as have a fixed and de-

⁽¹⁾ 6 Co. Rep., 17.

⁽²⁾ Law Rep., 4 Ex., 141.

⁽³⁾ *Grieve v. Grieve*, Law Rep., 4 Eq., 180.

terminated intent imputed to them whensoever they occur in a will, unless some contrary argument can be derived from the construction of the will and the circumstances connected with the property and the position of the family.

Now, my Lords, it has been settled for about 300 years that if, on reading a will you find these words: "I give to A. and his children my estate and property," and so on, then *prima facie*, if you make no inquiry at all about the state of the family of the donee and the devisee, and assume that there was a family in existence at the date of the will, those words in themselves mean a gift to the parent and the children as either joint tenants or tenants in common, as the 463] case may be, according to the construction *of the other words of the will. But if you find on inquiring into the state of the family that there was no child whatever of A. in existence at the time of the will being made, then in order that the children who may come into existence (their parents being alive) may have some share of the interest which was evidently intended in some way or other to reach them, you, in such a case, according to the rule which has been established for 300 years, interpret the words as being a limitation to the parent for life with remainder to the children successively, so that each of them shall have his chance in his turn of taking the property. The words the testator has used here in that part of the will in which he gives a power to the children are these: "I do hereby give and leave a full discretionary power to each of my children arriving at the possession of this landed property." In fact everything in this will, as far as I can see, tends to show that the construction which was established by the rule laid down in *Wild's Case* (') is the construction which will alone give full effect to this testator's intentions. I should doubt very much whether we could do as is said to have been done in one case which was referred to, namely, construe the will by anything as the consequences which might be suggested as being derived from the particular construction. I apprehend when a rule of construction of this kind has been established for the long period for which this has been established, we must take the meaning of the bequest as arrived at by that rule of construction, and we must not alter that rule which has been so settled, upon any slight considerations, or any suggestions that may be made with reference to possible consequences.

With regard to this case, it has been endeavored to be argued, as in some previous cases, particularly in the case

(') 6 Co. Rep., 17.

of *Seale v. Barter* (¹), that you are not to construe this will under the particular circumstances of this case by the rule which was laid down in *Wild's Case* (²), because it is suggested that it is improbable (no one ventures to say that it is impossible so to construe it) that the testator should give to the devisee a full and complete ownership in the shape of an estate tail, which might be made an estate in fee, by the executing of a proper deed for the purpose of *bar- [464 ring the entail, and should, at the same time, give him a power of distribution, which he could exercise by testamentary disposition as soon as he was once in possession of the property.

Now, in the first place, my Lords, it is scarcely correct to say that a testator has at all times before him all the consequences which may arise from his making a particular disposition of his property. It is one thing to say that he must be taken to know the law, and when he contemplates what he is doing, he must be taken to know the effect of all the different provisions he is making, but it is quite another thing to say that he must have present to his mind the subsequent effects, not connected with his own gift of the property, but connected with the different dispositions of it which he authorizes to be made.

But there is another reason why the testator might well give a disposing power, and yet at the same time create an estate tail. Those who take estates by will naturally pay some regard to the intention as exhibited on the face of the will by their testator; and it might well be that a testator would say: I make this provision because I think this, *rebus sic stantibus*, to be the best disposition I can make of my property: but then there are two or three circumstances to be considered; there is a baronetcy in the family; it is desirable that the baronet should be placed in a better position than the rest; I have not done that; I leave it to those who come successively into the possession of the property to do what they think right in that respect; I delegate to them certain powers which they may think it right and necessary after my decease to exercise, in order that they may more completely fulfil that which I wish them to consider their duty, namely, to carry into effect all my intentions as far as I can at present judge of them, and at the same time to retain in their hands a certain power derived from me, which they will not be offending me in my grave by exercising; and for that purpose I give them the power of disposing of the property as they think best, either for the

(¹) 2 B. & P., 485.

(²) 6 Co. Rep., 17.

purpose of maintaining the position of the baronetcy in the family, or for the purpose of rewarding or punishing obedient or disobedient children, as the case may be. They are to execute the provisions I have made, or they may proceed, by the exercise of the power, to modify the interests I have 465] created in order to meet *the two objects I specially have in view, and to which I have drawn their attention, namely, dealing with the baronetcy in the manner I have described, if they think proper, when they come into possession of the property some years hence, and also rewarding or punishing any obedient or disobedient children in the way they may think fit. I do not see in the least how it could have been supposed that the giving of this power over the estate should render it impossible, on the ground of inconsistency, to attach the proper sense to the words used by the testator, which bring the case within the rule in *Wild's Case* ('), namely, the gift to the parent and the children. I see in that no reason for departing from the rule.

The other cases which were cited have been thoroughly sifted by my noble and learned friend on the woolsack, and I need not enter into them now. One of those decisions cited was, it seems, a decision which I gave twenty-five years ago (*). It was a well-considered decision at the time, and I have found nothing in what has taken place since, and I have heard nothing in the argument on this occasion, to satisfy me that I there departed from the long-settled rule which I certainly intended to follow, which says that a gift to A. and his children when he had none, creates an estate tail in the parent; and as to the estate tail I should observe that it would carry the object into effect by the subsequent limitations to the children.

Therefore, I entirely agree with the motion which has been proposed by my noble and learned friend on the woolsack, that the decision of the court below should be affirmed, and the appeal dismissed with costs.

LORD BLACKBURN: My Lords, I am entirely of the same opinion. The subject of the construction of wills did not so often come before the courts of common law, in which I practised, as before the courts of equity, and therefore if there had been anything which required a careful consideration of the cases which existed on this point, I should have been afraid to decide without looking at them more than I have done. But my noble and learned friends who have 466] *spoken before me, who are both well acquainted with those cases, say that there are not cases (and I think if

(¹) 6 Co. Rep., 17.

(²) *Kavanagh v. Morland*, Kay, 16; 23 L. J. (Ch.), 41.

there had been any Mr. Williams would have cited them) which bear against the decision under appeal, and the general principles of the cases one well knows. That being so, I have no doubt that the decision of the court below was right, and should be affirmed. I will only meet those arguments that were used against it which struck me as the best.

In the first place it must be remembered that when *Wild's Case* (') was decided, and indeed for a long time after that, it was the law that the heir-at-law of a testator should not be disinherited without express words, or without something which indicated an express intention. That was very contrary to the general intention of testators. For a long while the courts were obliged to say, If there is nothing to show distinctly that the heir-at-law of the testator is disinherited, he is not to be disinherited farther than is necessary; if a testator gives Blackacre to A., and does not use words of inheritance, the heir-at-law must take it after A.'s death; it is to be a gift only for his life. But, then, in more modern times the courts caught at, and sought for, things which would enable them to give effect to what no doubt the testator generally intended. If he said, I give my "estate of Blackacre" to A. and so on, that did disinherit the heir-at-law, because it was said that "estate" meant the whole inheritance, and consequently the heir-at-law was disinherited by such a word. But (and that is what I now wish to point to) at the time when *Wild's Case* (') was decided no such idea of catching at words showing that, contrary to the rule of law, an intention existed to disinherit the heir-at-law, was thought of. It is very true that if, according to *Wild's Case* ('), there had been a devise of Blackacre, or the lands of Blackacre, to A. and his children, if they took as tenants in common, according to the first alternative, if children were alive, they would have taken their several estates for life, and for life only, and the heir-at-law of the testator would not have been disinherited. If, on the other hand, exactly the same words had been used leaving Blackacre to A. and his children, when there were no children alive, then, according to the rule of construction *laid down in [467 *Wild's Case* ('), that would give an estate tail, which would be an estate of inheritance, and would *pro tanto* disinherit the heir-at-law, much more than the other would have done. The heir-at-law would still, I apprehend, have taken a reversion after the estate tail, but that would have been of comparatively little good to him.

(') 6 Co. Rep., 17.

On that Mr. Williams argued thus, as I understood him; he said, that being so, the rule in *Wild's Case* (') applies whenever it is merely "the lands of Blackacre," or, as I put it, merely "Blackacre" (without any more words) that is given, because that has the effect of disinheriting the heir-at-law (because you then make it an estate tail) and that has a merit in it; therefore you would apply the rule in *Wild's Case*. But *aliter* if the testator had said "the estate of Blackacre," because there it is no longer necessary to have an estate tail for the purpose of disinheriting the heir-at-law. But, my Lords, I apprehend at the time of Lord Coke, and long afterwards, so far from that being a merit, or being an argument in favor of a construction of a will, it would have been considered a very strong reason for construing the will the other way. It would have been said (I have no doubt Lord Coke would have said that, if it had been put to him); although by holding that, we must disinherit the heir-at-law, still, we must do that, though that is a great objection. It certainly never would have entered into Lord Coke's mind to say, I think we must make it an estate tail because it will have the effect of disinheriting the heir.

That being so, I think Mr. Williams' argument was, that inasmuch as here the word "property" is used (I will assume for the moment that the word "property" is equivalent to "inheritance") inasmuch as by his will the testator left an inheritance in his lands to his son Henry, and his children, it was not necessary in order to make that an estate of inheritance to give an estate tail; therefore it was not required to construe "children" as a word of limitation amounting to "I give an estate tail," but if it had been, "I leave my lands," it would. I see no authority for that—none was cited, and I think *Seale v. Barter* (') is very much against it, for though, in that case, there was the word 468] "estate" brought in *(very much as "property" is here) in a way that might be said to give an estate of inheritance, I do not see anything to lead me to suppose that that was acted upon. Therefore I think this must be taken as coming within the rule of *Wild's Case* ('), and it would be just the same, if, instead of the word "property" being used, the word "estate" had been used. The construction of the will would be exactly the same, as far as this point goes, whether you say, "I leave an estate of inheritance in Blackacre to A. and his children," or whether you merely say "I leave Blackacre to A. and his children." Of course

(') 6 Co. Rep., 17.

(') 2 B. & P., 485.

it is immaterial now, when a will has been made since the passing of the Wills Act in 1837; it is only in construing an old will that this question would arise at all. However, I think that is no reason for construing the word "children" in the sense of words of limitation.

I quite agree, my Lords, that there may be, in another part of the will, enough to show that this word "children," which *prima facie* means sons and daughters, when contained in such a gift as that giving lands to A. and his children, he having no children existing at the time the bequest was made, although by this rule of construction, which has existed for 300 years, those are to be taken *prima facie* as words of limitation only, yet there may be something in the rest of the will, in the context and in the other devises, to show that those words ought to be taken in another sense. But then I can see nothing in the rest of this particular will which would have that effect. What immediately follows the devise to the testator's son Henry and his children is a bequest in default of such "issue." *Prima facie* that would strengthen the construction that the word "children" was a word of limitation, but I do not for my own part believe that the testator had a sufficient knowledge of the legal meaning of words to attribute very much weight to that.

Then comes a gift to the second son and his children. That again would be exactly the same thing. "Children" would *prima facie* have the sense of words of limitation. I see nothing in that.

Then comes the power. It is true that the power which was there given was one which if it was an estate tail was superfluous. *If the testator had had a sufficient [469 knowledge of the law, he might have been aware that he, having given an estate tail, his son Henry with his eldest son could, by the process of barring the estate tail, dispose of it in any way he liked, and consequently the effect was to give him a power which was not contradictory but superfluous. That might have been an argument tending to show that giving the power was not consistent with giving an estate tail; but *Seale v. Barter* (1) decides that very point. If the decision in *Seale v. Barter* had not existed, I think I should have decided the same way, but I am content to say that *Seale v. Barter* is there; and that being so, I see no reason for departing from it. I think, therefore, that the existence of the power is no reason why "children" should be taken as meaning words of limitation.

(1) 2 B. & P., 485.

My Lords, there was a farther argument used, namely, that when the word "children" is used, and there is nothing whatever to show the contrary, it would not be a word of limitation, but a word meaning sons and daughters. But *Wild's Case* says (') that when it is given to Henry Warren and his children, he having no children at the time, that gift is sufficient to show that it is a word of limitation. I agree that if the word "children" is used in another part of the will, and is so used as to show that the testator did not here use it in such a sense as *Wild's Case* (') says it *prima facie* bears, that is a sufficient reason for saying that the word "children" shall be restored again to its primary sense, and, consequently, the rule in *Wild's Case* (') will no longer apply. But, then, when I look at what we have here, I do not find anything of the sort. The testator says, "I do hereby give and leave a full discretionary power to each of my children arriving at the possession of this landed property to dispose of it by their will and testament." It is plain that there he uses the words "to each of my children arriving at the possession of this landed property" as perfectly equivalent to saying "my eldest son Henry Warren Brooke and his children, my second son Charles and his children, and my daughter Harriet Louisa and her children, whom I have already mentioned."

470] *But then he says that each of them may dispose of it by will and testament "to one or to each of their children (should they have any lawfully begotten) in such manner and in such proportions as to each of them my own children shall seem meet and right and proper." Now, the argument on that point was this. It was said this shows that when he gave a power to dispose of it among the children of his own children, that must have meant their sons and daughters. Why? *Seale v. Barter* (') decided exactly the contrary. There, where an estate was given to the testator's son John Seale and his children with a power for him to devise it amongst "them" (which referred to "children"), it was held that that meant "issue," and that John Seale and his children meant "issue." The word of limitation "issue" was held to be meant, and it enabled him to give it to his issue. Why should it not be so here if necessary.

The testator goes on to give a farther reason. He says, "My reason for this is" (I agree that that means giving the power) "that I think it right, as there is a title of baronet in the family, the eldest son ought to possess something

(') 6 Co. Rep., 17,

(') 2 B. & P., 485.

more than the others, and also that I never wish to encourage disobedient children, therefore I leave this power of punishing or rewarding as each of them coming into possession of the property and having children shall deem right." Why should the word "children" there be cut down to sons and daughters, and not be interpreted as it would be according to *Seale v. Barter* (?)? When the power was given to John Seale and his children the power was held to be a power to settle it upon his issue, because "children" meant "issue." Why should it not be held here that the power to settle it amongst the children should mean amongst the "issue" in the same way? I do not think it is necessary for your Lordships to decide that at all, but, certainly, it seems to my mind very clear. If of the two I am to say, on the one hand, that "children" in the earlier part, which would be a word of limitation meaning "issue," should be cut down or restored to its original sense because in the later part the testator speaks of rewarding obedient or punishing disobedient children, or on the other hand, I am to [47] say that the latter words applying to the power of rewarding or punishing children are to be extended to issue, according to the sense in which the word "children" is used in the earlier part, I greatly prefer to extend the power rather than to cut down the previous devise. However that, I think, is a matter which it is not necessary to consider, and all the rest, I think, is really concluded by authority.

I do not think it is necessary to say anything more upon the subject, than that I perfectly agree with the judgment of the court below, and I think it should be affirmed, and the appeal dismissed with costs.

LORD WATSON: My Lords, I have no hesitation whatever in holding that the interest which Sir Henry Warren took in the lands devised by his father's will was that of a tenant in tail and not of a tenant for life. The will contains, in substance, a devise of these lands to Sir Henry Warren who, at its date, had no children, and notwithstanding the argument we have heard at the bar, it appears hardly to admit of serious dispute that the terms of the devise, taken by themselves, confer an estate tail upon the devisee. It has, however, been contended that the rule of construction applicable to such a devise is not absolute, but must yield to the intention of the testator as expressed in other parts of the will, and farther, that in the context of Sir Joseph Brooke's will there are certain powers and explanations by the testator which evince his intention to limit his eldest

(1) 2 B. & P., 485.

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son's interest to a life estate, with so much clearness that they must be admitted to control the antecedent words of disposition. The learned counsel for the appellants had no difficulty in making good their proposition to the effect that the rule of construction adopted in this case by the courts below, is a rule which obtains *prima facie* only, and may be displaced by sufficient indication of a contrary intention on the part of the testator; but they have failed entirely, in my opinion, to show that that proposition has any bearing upon the terms of the will before the House. After listening carefully to the arguments for the appellants, I can well 472] conceive that questions of *much difficulty may arise in regard to the quantity of evidence of contrary intention requisite in order to overcome the rule of construction established by *Wild's Case*(¹). In the present case, however, it appears to me to be unnecessary to consider any question of that kind, because I am quite satisfied, for the reasons which have already been assigned in detail to your Lordships, that in reality there exists no inconsistency whatever between the words of devise, read according to the rule in *Wild's Case*(¹), and the context of Sir Joseph Brooke's will. I therefore concur in the motion which has been made.

*Judgment and order appealed from affirmed;
and appeal dismissed, with costs.*

Lords Journals, 13th May, 1880.

Solicitors for the appellant: *Clayton, Sons & Fargus.*

Solicitors for the respondent: *Whyte, Collison & Prichard.*

(¹) 6 Co. Rep., 17.

[5 Appeal Cases, 473.]

H.L. (E.), May 25, 27, 1880.

[HOUSE OF LORDS.]

473] *THE ATTORNEY-GENERAL AND EPHRAIM HULCHINGS (Relator), *Appellants*; and THE DIRECTORS, &c., OF THE GREAT EASTERN RAILWAY COMPANY, *Respondents* (¹).

Railway—Powers to Contract—Ultra Vires.

The doctrine of *ultra vires* as explained in *The Ashbury Railway Company v. Riche*(²) is to be maintained, but is to be applied reasonably, so that whatever is fairly incidental to those things which the Legislature has authorized by an act of Parliament, ought not (unless expressly prohibited) to be held as *ultra vires*.

(¹) Affirming 27 Eng. R., 672.

(²) Law Rep., 7 H. L., 653; 14 Eng. R., 42.

In an act of this kind granting special powers, what is not permitted is prohibited.

Per LORD WATSON: The test applied in the *Ashbury Case* to the powers of a joint stock company (limited), registered under the Companies Act, 1862, applies with equal force to the case of a railway company incorporated by act of Parliament.

An act of Parliament authorized a company to make a railway to T. and S. There were two other railway companies which were afterwards combined into one called the Great Eastern Railway Company. This latter company entered into a contract with the T. and S. Company, with which it was in connection in several respects, to supply it with rolling stock upon receiving a certain annual payment, and having certain other advantages. The contract was adopted by the shareholders of both companies. An action was brought against the Great Eastern Company, and an injunction asked for to restrain it from executing this contract. One of the acts relating to the two companies contained (cl. 14) the following provision: "The two companies may enter into agreements with respect to the working, maintenance and management of the Extension railway [this was the T. and S. railway], or any part thereof, and of the railways of the two companies connected therewith [these were the two companies which had been incorporated under the name of the Great Eastern], and with respect to the apportionment of the traffic, and of the tolls, fares and charges for traffic on the extension railway, and the railways of the two companies, the appointment of a joint committee, or any other matters incident to the carrying out the purposes of this act." The 15th clause of the act was in these words, "The directors of the T. and S. Company and the directors of the two companies, respectively, may (subject to the sanction of the shareholders) enter *into any con- (474) tracts or agreements for effecting all or any of the purposes of this act, or any objects incidental to the execution thereof, and every such contract or agreement may contain such covenants, clauses, powers, provisions, and conditions as may be mutually agreed upon between the parties thereto."

Held, that the contract of the G. E. Company to supply the T. and S. Company with rolling stock was not *ultra vires*, but was warranted by the words of these sections of the act.

THIS was an appeal against a decision of the Court of Appeal, by which (*diss.* Lord Justice Baggallay) a previous decision of the Master of the Rolls was reversed (¹).

In 1852 an act was passed (15 Vict. c. lxxxiv), by which the London, Tilbury and Southend Railway Company and the Eastern Counties Railway Company and the London and Blackwall Railway Company (the latter two being railway companies previously incorporated) were authorized to make a railway from the parishes of East and West Ham, in the county of Essex, to the Southend Pier, a branch to Tilbury Fort, and certain other works described in the act as the "Extension railway." All lands (sect. 7) purchased for the purpose of the extension railway were to be conveyed to the Eastern Counties and London and Blackwall Railway Companies jointly for the purposes of the act. Each of the said companies was to be entitled (sect. 105) to use the railway and works for all purposes necessary for the traffic or business of the company. And the companies, with the authority of a general meeting of each (sect. 109) might from time to time make and carry into effect all such

(¹) 11 Ch. D., 449; 27 Eng. R., 672, where the facts are fully detailed.

mutual contracts with respect to the undertaking by the act authorized, or the interests of any one of the companies relating thereto. Under the powers of this act the Eastern Counties and the London and Blackwall Companies raised part of the capital for the execution of the works of the Extension Railway, and entered into a contract with Peto, Betts & Brassey (afterwards called the lessees) for the construction by them of the extension railway, and for a lease to them of the same for twenty-five years from the 1st of January, 1863. By an indenture of the 25th of March, 1854, executed by the Eastern Counties Railway and the lessees of the other part, it was agreed that the railway company 475] should, during the continuance of the contract *provide and maintain, and from time to time replace in good condition and efficient working order, all such rolling stock, stores, and locomotive power as should be necessary for working the traffic of the extension railway, and should haul and convey the traffic of the railway on and over the same railway and on and over the line of the Eastern Counties Railway, or that line and the London and Blackwall Railway, as therein specially described. In consideration of all which things the lessees were to pay certain sums specified in the contract. Other acts were passed which referred to and in that way recognized what had thus been agreed upon, and the stipulations in the contract were duly performed.

By "The Great Eastern Railway Act, 1862," the Eastern Counties Railway Company, and the other companies mentioned therein were incorporated, and all the privileges and liabilities of the Eastern Counties Railway Company became vested in "The Great Eastern Railway Company."

In June, 1863, was passed (26 & 27 Vict. c. lxix) "An act to authorize arrangements between the London, Tilbury, and Southend Railway Company, and the lessees of their undertaking and the Eastern Counties and London and Blackwall Railway Companies, with reference to the lease and working of the London, Tilbury, and Southend Railway, and for other purposes." This act recited the various matters already mentioned, and the 14th section (that on which the question in this case turned) was in these terms:

"The two companies may enter into agreements with respect to the working, maintenance, and management of the extension railway, or any part thereof, and of the railways of the two companies connected therewith, and with respect to the apportionment of the traffic, and of the tolls, fares, and charges for traffic, on the extension railway, and the railway

of the two companies, the appointment of a joint committee, or of any other matter incident to the carrying out of the purposes of this act."

Section 15. "The directors of the Southend Company, and the directors of the two companies respectively may, subject to such sanction of shareholders as by this act prescribed, enter into any contracts or agreements for effecting all or any of the purposes of *this act, or any objects [476 incidental to the execution thereof, and every such contract or agreement may contain such covenants, clauses, powers, provisions, and conditions as may be mutually agreed upon between the parties thereto."

The clauses of the Railways Clauses Consolidation Act, 1845, with respect to leasing railways were incorporated with this act.

The London and Blackwall Railway Lease Act, 1865 (28 Vict. c. c.), enabled that company to lease the undertaking, property, and effects of the company to the Great Eastern Railway Company, which was authorized to accept such lease. The clauses of the Railways Clauses Consolidation Act, 1845, with respect to leasing railways were also incorporated with this act. The authority granted in this act of 1865 was acted on, and a lease was made.

The lease granted to Messrs. Peto, Betts & Brassey, expired on the 3d of July, 1875, and the London, Tilbury and Southend Railway Company entered into possession, and began to work the line. It had during the continuance of the lease been worked by the Great Eastern Railway Company. That company, on the expiration of the lease, entered into an arrangement with the London, Tilbury and Southend Company as to the working of the line, which arrangement received the sanction of the shareholders of both companies.

This arrangement was embodied in an indenture of the 1st of June, 1876, by which (sect. 18) the Great Eastern Company undertook to supply the Tilbury Company with locomotive power on certain terms and conditions therein stated, subject to the servants, and engines, and coal, and other stores required for such working being carried free of charge over the Tilbury line.

Mr. Ephraim Hutchings, the secretary of the Locomotive Manufacturers Association, and the Railway Carriage and Wagon Builders Association, became (as relator, through the Attorney-General) the plaintiff in an action to restrain the Great Eastern Railway Company from letting for hire any locomotive engines, or other rolling stock, except for

the purposes of traffic on another railway in extraordinary emergencies, and from manufacturing locomotives, engines, or other rolling stock, for the purpose of letting the same on hire, or for any other purpose except for the purpose of being used by the Great Eastern Railway Company 477] *upon a railway, or some part thereof, worked by that company itself. The agreement of the 1st of June, 1876, was alleged as the instance of the directors exceeding their powers. The directors of the Great Eastern Company denied letting their rolling stock to any but the Tilbury Company, and justified that under the various acts of Parliament referred to above, especially the 14th section of the act of 1863.

On the 14th of January, 1878, the Master of the Rolls granted a perpetual injunction to restrain the Great Eastern Company from letting for hire any locomotive engines or other rolling stock, except for the purposes of traffic on another railway in extraordinary emergencies, or for letting the same on hire for any other purpose, except that of being used by the Great Eastern Railway Company upon a railway or some part thereof worked by that company. On appeal, Lords Justices James and Bramwell (*diss.* Lord Justice Baggallay) discharged this order of the Master of the Rolls (*). This appeal was then brought.

Mr. Kay, Q.C., Mr. Bompas, Q.C., and Mr. Macnaghten, Q.C., for the appellants, contended that the various acts relating to these companies gave the Great Eastern Railway Company no authority to enter into such a contract as that of the 1st of June, 1876. *Blakemore v. The Glamorganshire Canal Company* (*), *The Eastern Counties Railway Company v. Hawkes* (*), *The Shrewsbury and Birmingham Railway Company v. The North Western and The Shropshire Railway Companies* (*), *The Ashbury Company v. Riche* (*), *The Warden and Assistants of Dover v. The London, Chatham and Dover Railway Company* (*), were cited and commented on, on the question of railway directors being bound to abide by the express directions of the acts conferring powers on the company.

478] *Mr. Chitty, Q.C., and Mr. Newton R. Smart, for the company, insisted that the acts done by the company

(*) 11 Ch. D., 449; 27 Eng. R., 672. There was another question discussed in the court below, namely, whether this was a case for the intervention of the Attorney-General. On that point the Lords declared that it was unnecessary, under the circumstances, to express any opinion.

(*) 1 Myl. & K., 154, at p. 162; 1 Cl. & F., 262.

(*) 5 H. L. C., 331.

(*) 6 H. L. C., 118.

(*) Law Rep., 7 H. L., 653.

(*) 3 De G., F. & J., 559.

were fairly within the powers of a railway company. But if that was not so, they were fully justified by the various acts affecting the company, and especially by the provisions of the 14th section of the act of 1863.

Mr. *Kay*, in reply.

THE LORD CHANCELLOR (Lord Selborne): My Lords, the question in this case is whether, under the acts of Parliament to which your Lordships' attention has been called, the respondent company is authorized and empowered to let for hire to the Southend Company locomotive power and rolling stock. The company claims to be so entitled. The Master of the Rolls and Lord Justice Baggallay thought that it was not so authorized; but Lords Justices James and Bramwell thought otherwise, and they discharged the order for an injunction which the Master of the Rolls had made. The present appeal to your Lordships is from that decision.

I assume that your Lordships will not now recede from anything that was determined in *The Ashbury Railway Company v. Riche* (*). It appears to me to be important that the doctrine of *ultra vires*, as it was explained in that case, should be maintained. But I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*. In the present case I think, with the court below, that the acts which the information was filed to restrain are not *ultra vires* of the defendant company. But I come to that conclusion, not on the ground that they are such acts, on the border line between authority and no authority, as may reasonably be thought incidental to the exercise of powers expressly given, but because I think that they are expressly authorized by the 14th section of the act of 1863. It is insisted by [479 appellants' counsel that the 14th section of the act of 1863 authorizes only agreements between the Great Eastern Company and the London and Blackwall Company, *inter se*; and that, relating as it does to the "extension," or Southend Railway, as well as to the railways of those two companies, they could make no such agreements until they had otherwise acquired an interest, sufficient to give effect to them, in the extension railway; and that they could only acquire such an interest by taking a lease, or a transfer of the existing lease, of that line. The appellants, therefore,

(*) Law Rep., 7 H. L., 653; 14 Eng. R., 42.

ask your Lordships to read this section as if, after the words "the two companies," with which it begins, these additional words were contained in it, "in the event of a lease or a transfer of the existing lease of the extension railway being taken by them, or either of them;" this being (as they say) necessarily implied.

It would, however, be contrary to sound principle to imply such a condition, not expressed in the clause, if the words, as they stand, would be sensible and operative without it: and it appears to me that they are so. It cannot, I think, be denied that, under the terms of that section, the two companies being authorized to "enter into agreements" with respect to the working of the extension railway, would have been empowered to make such agreements with the Southend Company, the owner of that railway, if there had been no existing lease, and nothing in the act enabling them to become lessees of the extension line. The Southend Company and the lessees are mentioned in that part of the preamble which, in my opinion, refers by anticipation to this very power, as meant (as much as the other two companies) to be enabled to do whatever might be necessary for the purposes, of which the expediency was there declared: and their directors are also, by the 15th section, expressly empowered to "enter into any contracts or agreements for effecting all or any of the purposes of this act." If the two companies might make agreements for the purposes of the act which could not be made without the concurrence of the Southend Company, it appears to me to follow that the Southend Company was authorized to concur with them in such agreements. If they became transferees of the existing lease, they might, perhaps, during its continuance have exercised this power without any concurrence of the Southend Company: but I do not think it possible to confine the powers of the 14th section to that particular case. If they took a new lease, sufficient authority was already given them, by the 4th and 8th sections, to do everything which the 14th clause contemplates, under the general words "powers, provisos, stipulations, conditions, and agreements," as incidents to such a lease. It cannot be right to cut down by any unnecessary construction the effect of the words of the 14th section, for the purpose and with the effect of confining it to a case which, in this way, had been already provided for. If it be necessary to consider why the two companies only were mentioned in the 14th section, I should say it was because the Legislature had in view the then existing arrangements, and contemplated that, under

any altered arrangements, those two companies would probably continue to undertake obligations of the like character. And I am satisfied, by reference to the preamble, that the construction which I ask your Lordships to place upon that section is proper to give effect to the expressed intention of the Legislature. In the preamble the existing lease, the existing working arrangements, and the proportionate division of tolls, &c., and of deductions for expenses, are referred to as three distinct things: and then it is recited to be expedient, that the Southend Company, the lessees, and the Great Eastern and the London and Blackwall Railway Companies, should be enabled to agree upon "such alterations," in each of these three things, (viz., first, "the terms of the lease;" secondly, "the arrangements for working the railway;" and thirdly, "the apportionment of the receipts and expenses,") "as by this act authorized." It is then farther, and as a separate and distinct purpose of the act, recited to be expedient to empower the Great Eastern and London and Blackwall Companies, jointly or severally, to take a lease or transfer of the existing lease of the Southend Railway, "upon such terms and conditions as by this act authorized." The plain object of the 14th section is to authorize new agreements, generally, as to working arrangements, and as to the apportionment of receipts and expenses. Such new agreements, as to "working arrangements," are nowhere else in the act expressly authorized.

*For these reasons I think that the order appealed [48] from is right; and I move your Lordships that the appeal be dismissed.

LORD BLACKBURN: My Lords, I am also of opinion that the order below was right, and that the appeal should be dismissed with costs. There have been three points on which the court below decided, and on two of them I do not think it necessary to express any opinion. By that I do not mean to be understood or supposed to say that they were wrong, but merely to mean, literally, the thing which I say, that it is not necessary to form, and not being necessary to form, it is not necessary to suggest, any opinion whether they were right or wrong. I take it that, as far as the main point to be considered is concerned, this House has no more right than any other tribunal to depart from the principle of the decisions which have been already arrived at; more particularly I allude to the last case of *The Ashbury Railway Carriage and Iron Company v. Riche* (¹). That case appears to me to decide at all events this, that where there

(¹) Law Rep., 7 H. L., 656; 14 Eng. R., 42.

is an act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited; and, consequently, that the Great Eastern Company, created by act of Parliament for the purpose of working a line of railway, is prohibited from doing anything that would not be within that purpose.

My Lords, I quite agree with what Lord Justice James has said on this first point as to prohibition, that those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited. But the point on which I desire to say that I neither form nor express any opinion, is whether or not the court below might be right in saying, on the question to which the injunction was directed, namely, the lending or manufacturing of rolling stock for the purpose of lending it to the Tilbury Company, that that was permitted in the particular local instance of the Tilbury Railway Company. I agree with my noble friend [482] and learned *friend on the woolsack in thinking, when we look at the act of Parliament, that the Legislature in this case has, not merely impliedly, but expressly, authorized the directors of the Great Eastern Railway Company to do all that they have done, namely, to enter into arrangements with the Tilbury Company respecting the working of that line, by which they were to supply that line with all the locomotive power, carriages, and other rolling stock which were required for working that line. I think that is not merely impliedly authorized, but is expressly authorized, by the act of Parliament in question, 26 & 27 Vict. c. 69, and particularly by the 14th section.

It must be remembered, that at the time that act was passed the two companies (now combined as the Great Eastern Railway Company, but then known as the Eastern Counties and the London and Blackwall Railway Companies), and the Tilbury Company, were altogether separate companies. I should say, farther, that the Tilbury line had been let for a limited period, namely, twenty-one years, to Messrs. Peto & Co., who were the lessees of the line; and there was, in fact, an agreement made, by which the Eastern Counties Company agreed with Messrs. Peto to work the line for them, in the sense that, during the existence of that agreement or lease, they were to furnish all the locomotive power and rolling stock, and do all those things which the present application is intended to prevent. That arrangement, though certainly not expressly authorized, has been im-

pliedly sanctioned by some allusions to it in previous acts. It is in the act now in question recited that there was such an agreement; and, having recited that, the preamble proceeds to say what it is now desirable to do. It says: "And whereas it is expedient that the London, Tilbury and Southend Railway Company, The Lessees, and the Great Eastern and London and Blackwall Railway Companies respectively should be enabled to agree upon such alterations in the terms of the lease, in the arrangements for working the said railway, and in the apportionment of the receipts and expenses as by this act authorized; and that the Great Eastern and London and Blackwall Railway Companies, jointly or severally, should be empowered to take a lease or transfer of the existing lease of the London, Tilbury and Southend Railway, upon such terms and conditions as by *this [483 act authorized." I think that those words, "such terms and conditions as are by this act authorized," may be properly considered to override the whole. One of the conditions is, that it is expedient that the companies should be authorized "to agree upon such alterations in the terms of the lease, in the arrangements for working the said railway, as by this act authorized." This is merely the preamble reciting what is desirable; then it proceeds, "And whereas the several purposes aforesaid cannot be effected without the authority of Parliament," and the act proceeds to carry the purposes into effect.

Now, it was urged that "the arrangements for working the said railway," *prima facie* and naturally, would mean the then existing arrangements between the Eastern Counties and Messrs. Peto & Co., the lessees. It would embrace that undoubtedly, but I do not think it is confined to that. I do not think it would have been at all necessary, if it had been confined to that, that the London and Blackwall Railway Company and the London, Tilbury and Southend Railway Company should agree upon altering the terms of an arrangement between Messrs. Peto and the Eastern Counties Railway Company with which these two other companies had nothing whatever to do. It seems to me that the more natural and plain meaning of this preamble is that all the arrangements for the time being for the working of the railway are to be altered as the companies may require, in such manner as by this act subsequently authorized.

Now, my Lords, passing from the preamble, the earlier sections down to the 13th contain nothing expressly authorizing any alteration in the arrangements. It has been attempted to be argued that the 4th section does this impliedly,

but there is nothing certainly pointed to this effect. Then comes the 14th section, and it says: "The two companies"—that is, the Eastern Counties and the London and Black-wall Companies—"may enter into agreements in respect to the working, maintenance, and management of the Extension Railway, or any part thereof." Now that seems to me distinctly to mean, following up the preamble, that it is desirable that they should be able to make such alterations in the arrangements as the two companies may agree upon. What alterations are these? That the two companies may enter into agreements with respect to the working. I will 484] leave the other point out of *the way for the moment. Enter into arrangements with whom? Certainly they cannot alter the working whilst the line is in the hands of the lessees without entering into an agreement with the lessees. If it is in the actual occupation of the Southend Railway Company itself, they cannot alter the arrangements without entering into an agreement with that company. Therefore it seems to me that the natural effect, taking the ordinary meaning of the words, would be that the two companies are authorized to enter into agreements with those who would be the necessary parties to it; and I should think, without more, that that would necessarily imply that the party with whom they were to make the agreement had authority to make it; but I must own, notwithstanding what Mr. Kay said in his reply, that it does not strike me that the Southend Company needed any authority to enter into any agreements for the purpose of working the line. I quite agree that a company cannot make a lease without the authority of Parliament. That has been expressly decided, and I quite agree that where an agreement under the shape and color of a working agreement really amounts to a lease, so as to be a delegation of the whole concern and all its powers, that is as operative as a lease itself. But I do not think that the agreements that are here pointed to, and the agreements that were actually made, do in the slightest degree amount to a lease. I can see no reason why the Southend Company might not make an agreement with an individual, and say, Instead of our buying and making and keeping locomotive engines of our own, we will contract with you that you shall supply locomotive engines, and instead of our buying and becoming possessors of carriages of our own, we will hire them; or why they might not say, Instead of ourselves keeping up and maintaining our own railway, we will make an agreement with you, a contractor, who shall keep up the railway and maintain it.

This does not amount to delegating the powers of the company; it does not amount to doing anything extraneous to the powers which the company has obtained, and I cannot see that it would need parliamentary authority to enable them to do any one of these things. I cannot help thinking that the fallacy of the argument there is, that it supposes that whilst the Eastern Counties and the London and Black-wall Railway Companies required parliamentary authority to apply their funds for the purposes of supplying locomotive engines, it follows that *the Southend Com- [485] pany would have required parliamentary authority before they paid for the hiring of those engines.

That does not seem to me to follow at all; but probably it is not necessary to decide anything of the sort; for I think the true construction of the 14th section is that when it is said you may make an agreement for working the railway, that necessarily means you may make an agreement with those who possess and occupy the railway as to which the agreement is to be made; and if it is necessary, it would by implication follow, not only that the two companies are authorized to make that agreement, but that the other company is authorized to enter into that agreement also.

Now, taking that view of the section, it will follow that all that the defendants, the now respondents, have done, and all that they propose to do, and all that the appellants have applied to enjoin them from doing, namely, letting for hire and manufacturing for the purpose of letting for hire, to the Tilbury and Southend Company, rolling stock, is expressly authorized by the terms of this act, and consequently, on that ground, and without anything farther, the application must fail.

I have already said that the first point is one on which I wished to express no opinion as to whether or not this particular thing does come within the ordinary powers of a company. The second point, which is whether or not the case is a proper one for the Attorney-General to interfere in, and to what extent the powers of the Attorney-General in such cases go, is one which I consider of great importance, and whenever it becomes necessary to decide that question I should desire to look into it very carefully, and to consider carefully what was the proper doctrine to be applied in such a case; but in this case, after the decision which I would advise your Lordships to come to, and which I believe the House will come to, that sect. 14 expressly authorizes the company to do all that it has done, it is quite unneces-

sary to decide anything on that last point, on which therefore I neither express nor form any opinion.

LORD WATSON: My Lords, the main question in this appeal is, whether it was *ultra vires* of the respondents to let for hire to the London, Tilbury and Southend Railway 486] Company, rolling stock and locomotive *power upon the terms and conditions embodied in an agreement between the two companies dated the 1st day of June, 1876. If that question be decided in the affirmative, the point which has been so fully argued in regard to the power of Her Majesty's Attorney-General does not arise for decision in the case.

I cannot doubt that the principle by which this House, in the case of the *Ashbury Railway Company v. Riche*⁽¹⁾, tested the power of a joint stock company registered (with limited liability) under the Companies Act of 1862, applies with equal force to the case of a railway company incorporated by act of Parliament. That principle, in its application to the present case, appears to me to be this, that when a railway company has been created for public purposes the Legislature must be held to have prohibited every act of the company which its incorporating statutes do not warrant either expressly or by fair implication. It follows that the Great Eastern Company has exceeded its statutory powers unless it can be shown that the company has statutory authority, express or implied, to let rolling stock and plant on hire to the Southend Railway Company.

The Great Eastern Railway Company has absorbed the undertaking and has become vested with the whole powers and privileges of the Eastern Counties and London and Blackwall Companies, both of which were in intimate relation with the Southend Railway Company. A railway was constructed by those two companies in virtue of statutory powers which proceeded upon the recital that "If such railway were constructed and worked in connection with the Eastern Counties Railway and the London and Blackwall Railway, the same would be of great public advantage." The cost of construction was met by the issue of new shares called London, Tilbury and Southend extension shares; and the undertaking was managed by a joint committee appointed by the boards of the two companies. Had matters continued in that position until 1877 the present question as to the power of the Great Eastern Company could hardly have arisen. Indeed it was not contended for the appellants that prior to the passing of the London, Tilbury and Southend Extension Act, 1862, the Eastern Counties and London

(1) Law Rep., 7 H. L., 653; 14 Eng. R., 42.

and Blackwall Companies, or either of them, had not the right to make an arrangement for working the Southend *Railway with their own plant. But the appellant [487 maintained that any such implied power was necessarily brought to an end by the change which that act operated upon the relations previously subsisting between the two companies and the Southend undertaking; inasmuch as the holders of Southend shares were thereby constituted a separate and independent corporation, in which both the undertaking and its management became thenceforth vested.

I should have had great difficulty in determining whether, and how far, any rights to make arrangements for working the Southend line, of the character of those under the consideration of the house, were impaired by the creation of the new company, having regard first to the professed purpose of the act of 1862, which, according to the preamble, was to give the proprietors of the London, Tilbury and Southend Extension shares, that which they had not before, "a voice or control" in the management of the railway and the appointment of directors; secondly, to the fact that two-thirds of the Southend board of directors must be nominees and also members of the respective boards of the Eastern Counties and London and Blackwall Companies; and, thirdly, to the broad terms of that section of the act, sect. 32, which saves the rights, powers, and privileges previously vested in these two companies.

But, my Lords, it is not necessary to decide these various questions, because I agree with your Lordships, and the majority of the Court of Appeal, in thinking that the required power is conferred upon the respondents in express terms by the London, Tilbury and Southend Railway Act of 1863.

The 14th section of that act provides that the two companies now represented by the respondents "may enter into agreements with respect to the maintenance and management of the extension railway or any part thereof." These words, according to their natural meaning, seem to me to give the two companies direct authority to agree with any person or corporation having power to contract on behalf of the Southend undertaking, to supply locomotives and rolling stock upon terms similar to those contained in the agreement of the 1st of June, 1876, between the Great Eastern and the Southend Companies.

It is contended, however, that the power conferred by sect. 14 is merely a power to the two companies to enter into mutual *agreements, in the event of both or either [488

of them becoming lessees or lessee of the Southend line under the provisions of sect. 4.

The language of the 14th section expresses no such limitation, nor does it, in my opinion, warrant the inference that any such limitation was contemplated. And the able argument for the appellants has failed to satisfy me that the context of the act necessitates a construction of sect. 14 limiting the powers thereby conferred upon the two companies to agreements *inter se*.

An examination of the preamble and enacting clauses of the act leads me to these conclusions—that the separate head of the preamble regarding “arrangements for working the said railway,” does not refer to leases or to alterations and readjustments of existing apportionments of tolls and charges, but to future arrangements similar in character to the working agreement at that time subsisting between the Great Eastern Company and Messrs. Brassey & Co., the lessees—that the only enactments which meet that head of the preamble are to be found in sect. 14; and that these enactments, when read according to their *prima facie* signification, more fully satisfy the preamble than when read according to the narrower construction now suggested.

Again it is said that if the wider construction be adopted the object of the clause would fail, because the Southend Company never possessed, and there has not been expressly conferred upon it, any power to enter into a working agreement which amounts to a delegation of its statutory powers. But I entirely agree with your Lordships that such a power on the part of the Southend Company is fairly derivable from these provisions which give authority to the Southend and London and Blackwall Companies, when taken in connection with the other provisions of the act.

I therefore concur in the judgment which your Lordships have expressed.

Order appealed from affirmed; and appeal dismissed, with costs.

Lord's Journals, 27th May, 1880.

Solicitors for appellant: *Hargrove & Co.*

Solicitor for respondent: *Capel A. Curwood.*

See 27 Eng. Rep., 725 note; 16 Amer. L. Rev., 101; 36 N. J. Eq., 8 note.

One who deals with the officers of a corporation is bound to know their powers and the extent of their authority; the corporation is only bound by their acts and contracts which are within the scope of their authority: *Alexander v. Cauldwell*, 83 N. Y., 480.

The powers of corporations organized under statutes are such, and such only, as those statutes confer, including implied as well as express powers: *American Union Telegraph Co. v. Union Pacific Railway Co.*, 1 McCrary, 188.

A contract in excess of the powers conferred, or, in case of a quasi public corporation like a railroad company, a contract which disables the corporation from performing its duties to the public, is void. Hence a corporation cannot alienate any franchise of any property necessary to perform its obligations and duties to the State, without legislative authority: *American Union Tel. Co. v. Union Pacific Railway Co.*, 1 McCrary, 188, following *Thomas v. West Jersey R. Co.*, 101 U. S., 71.

The directors of a railroad company, without any authority either by statute or charter, passed a resolution to assume certain debts and to buy a majority of the stock and bonds and the equipment of a rival road. The resolutions also provided for the calling of a special meeting of the stockholders to vote upon the matter, and it was not to be carried out without their approval.

Held, 1. That the proposed purchase was *ultra vires*, and hence could not be executed even if ratified by the stockholders.

2. That it was void and against public policy, in that its object was to prevent lawful competition.

3. That it could be enjoined upon the application of a single stockholder of the purchasing company, and that the fact that the stockholder had obtained his stock after the passage of the resolutions, and with the avowed design of preventing its consummation, would not affect his right to relief: *Elkins v. Camden*, etc., 36 N. J. Eq., 5.

Where a corporation enters into a contract which, though prohibited by its charter, has been fully executed on the one side, and nothing remains but

to pay the consideration money, it will not be allowed to set up, as a defence to an action to recover the consideration money, that the contract was *ultra vires*.

Where the plaintiff in such action has made out his case, without calling to his aid the alleged illegal transaction, the defendant, who has enjoyed the benefit of the transaction, will not be permitted to set up as a defence that the transaction was *ultra vires*.

The defence of *ultra vires* is never allowed out of regard for the defendant, but rests solely upon public policy: *Wright v. Antwerp*, etc., 13 Weekly Notes (Penn.), 325, following *Oil Creek*, etc., v. Penn. Trans. Co., 83 Penn. St. R., 160.

Although a contract may be *ultra vires*, if it has been executed in whole or in part, neither party to it will be permitted to rescind it of its own motion, and to recover, without process of law and by force, the consideration paid or property acquired under the contract; and in such case a corporation that has received a large consideration for a contract *ultra vires* for the sale of a telegraph franchise, will be restrained from resuming possession of said franchise and the property connected therewith, until an accounting and settlement can be had between the parties: *American Union Tel. Co. v. Union Pacific Railway Co.*, 1 McCrary, 188.

It cannot be presumed that the agent of a corporation had authority to transact business which the corporation itself was not by its charter authorized to engage in: *Alexander v. Cauldwell*, 83 N. Y., 480.

Certain contracts entered into by the Union Pacific Railroad Company, assigning a large part of its franchise, and alienating property which was necessary to the performance of its obligations and duties to the government and to the public, held *ultra vires*: *American Union Tel. Co. v. Union Pacific Railway Co.*, 1 McCrary, 188.

The consolidation of two railway companies, according to the provisions of a statute existing at the time of a subscription to the capital stock of one of the companies, will not discharge the subscriber: *Atchison*, etc., v. Com'rs, 25 Kans., 261.

1880

Attorney-General v. Great Eastern Railway Co.

H.L.(E.)

A contract between two *connecting* railroads for the division of earnings, according to the distance which each corporation shall have carried the passenger or freight for which the money is paid, is within the discretionary powers of the directors, and its execution cannot be enjoined at the instance of a stockholder, who does not show a dishonest or fraudulent purpose on the part of the directors in making such contract, and that he will be injured thereby: *Elkins v. Camden, etc.*, 36 N. J. Eq., 241.

A corporation was created in one State to promote a benevolent enterprise, and its charter provided that the presidents of institutions organized in other States of the Union to collect funds to aid it should constitute a board of visitors, with absolute supervisory control over its affairs. In another State such an institution was formed. The trustees thereof reserved the right, in conjunction with the presidents of other similar boards, to supervise and administer the affairs of the original corporation in accordance with its charter, and collected a fund to be applied in aid of it.

A fundamental change was subsequently made in the charter, whereby the visitatorial rights of the auxiliary institutions were materially changed. The contributors to the fund demanded a return of it, upon the ground that the conditions upon which it had been advanced were not performed, and the corporation brought suit against the institution to recover it. Held, that the suit could not be maintained.

Section 9 of the amended charter of the corporation changed essentially the constitution and powers of the board of visitors, as created and defined by sect. 10 of the original charter: *Printing House v. Trustees*, 104 U. S. Rep., 711.

Under the charter of the Green Bay & Minnesota Railroad Company it had power to enter into an agreement with the proprietors of steamboats running by way of the great lakes, between its eastern terminus and Buffalo in the State of New York, by which it guarantees that the gross earnings of each boat for two years shall amount to a certain sum: *Green Bay, etc., v. Union, etc.*, 107 U. S. R., 98.

One railroad company has power, un-

der the statute of New York, to lease its road to another, or to modify such lease. The directors of a corporation have a general power to make or modify its contracts, and its stockholders cannot control that power: *Flagg v. Manhattan, etc.*, 20 Blatchf., 142.

In an action against the trustees of a corporation to charge them with a debt of the corporation because of an omission to make and file its annual report, it appeared that it was organized for the purpose of mining coal and bringing it to New York for its stockholders and for sale, and this was stated in its certificate of incorporation. The treasurer of the corporation wrote to plaintiffs under the heading of the corporate name, stating that they desired plaintiffs to furnish them with coal delivered to any part of the city, as directed, plaintiffs collecting the bills in the name of the company and being paid the difference due each month; also to deliver the company's coal, and to act as its delivery agents. Plaintiffs answered, assenting to the arrangement. Under it upon orders issued by the secretary and the treasurer who were not directors of the company, plaintiffs delivered coal to divers persons, and the alleged indebtedness of the company was for a balance due upon the coal so delivered. It did not appear that the coal was delivered to stockholders or upon any contracts made by the company, or that the transactions were known to any of its directors, or appeared upon any of its books. It did appear that they were not authorized by resolution of the board of directors and that they were unknown to a majority of them, and there was no competent evidence that the corporation received the proceeds of the coal. Held, that plaintiffs failed to establish a debt against the corporation, and therefore that the action was not maintainable.

Also, held, that admissions of the treasurer that he had received payment for the coal and had used it in the business of the company was incompetent; that he being unauthorized to buy the coal, could not bind the company by subsequent admissions that he had received and disbursed the proceeds for its benefit: *Alexander v. Cauldwell*, 83 N. Y., 480.

Where a stockholder seeks to restrain

the execution of a "pooling" contract between two railways, both the corporations are necessary parties: *Elkins v. Camden, etc.*, 36 N. J. Eq., 241.

In the absence of an express authority or a custom of the trade to buy upon credit, an agent who is furnished with funds to make purchases cannot bind his principal by a purchase upon credit.

If goods are sold to such agent on credit and are by him delivered to the principal, the latter will not be liable to the vendor unless he received the goods knowing them to have been bought upon credit, or that he had no funds in the hands of the agent at the time sufficient to pay for the goods: *Komorowski v. Krumdick*, 56 Wisconsin, 28.

Where a principal has authorized his surety to sell certain of his property to indemnify himself, and use the rest of the proceeds for specific purposes, he cannot complain if, on his own advice, the surety takes paper instead of cash in payment; or if he takes it in his own name; so long as he acts in a careful, prudent, honest and business-like way, and with such care and judgment as a reasonable man should exercise.

The owners of a vessel deeded it to certain persons as security, with authority to sell it if a good opportunity offered. Held, that the grantees had a right to pay any outstanding claims for supplies which had been properly allowed against the vessel, and the grantors could not complain of their paying any bills for repairs which they had themselves contracted to pay; the grantees could also pay from the earnings of the boat for such repairs as

were reasonably necessary for keeping the vessel in good condition while in their hands, or for putting it in good condition to sell, or for such as the grantors directed, but they could not be allowed for such expenses as had been necessary by their own neglect of mismanagement. Where property has been left with another to sell, the latter is not liable for failure to collect payment unless guilty of negligence, bad faith or dishonesty: *Fick v. Runnells*, 48 Mich., 302.

Where the committee of a building society authorized its secretary to place lands (of which the society was mortgagee) in the hands of an auctioneer for sale: Held, that the secretary had no authority to withdraw the land from sale without a resolution of the committee to that effect: *Ross v. Victorian, etc.*, Vict. L. R., 8 Eq., 254.

A sale of engravings by a cashier in the employment of a picture engraver is not a sale within the ostensible authority of the cashier: *Graves v. Masters*, 1 Cababé & Ellis, 78.

An agent to sell has no authority to exchange: *Stewart v. Rounds*, 7 U. C. App. R., 515.

An agent to sell can, unless authorized, only sell for cash. He cannot sell in payment of his own debt: *Burks v. Hubbard*, 69 Ala., 379.

An officer of a bank has no authority to allow over-drafts, and is personally liable therefor if he does. If the cashier inaugurates such dealings he may be held liable for an over-draft allowed by a subordinate in his absence, unless forbidden: *Oakland Bank v. Wilcox*, 60 Cal., 126.

[5. Appeal Cases, 489.]

H.L. (Sc.), March 8, 1880.

[HOUSE OF LORDS.]

489] *SMITH, *Appellant*; ARCHIBALD and Others, *Respondents*.*Public Well—Public Health (Scotland) Act, 1867, s. 89, subs. 4—Servitude—Right of Local Authority to repair a Well on Private Property.*

The Public Health (Scotland) Act, 1867, s. 89, subs. 4, provides, that, "The local authority may cause all existing public cisterns, pumps, wells, reservoirs, conduits, aqueducts, and works used for the gratuitous supply of water to the inhabitants to be continued, maintained, and plentifully supplied with water." A well situated on private ground, the water of which has been used for domestic purposes gratuitously by the inhabitants in the vicinity for the prescriptive period, is a public well within the meaning of this section; and the local authority can enter on the land and do all acts to the well for continuing and maintaining it, which the inhabitants might have done before. And this, notwithstanding that there may be a company with a vested right to supply the inhabitants with water.

Situated in one corner of a private field in the parish of Denny is a well. From the well to the entrance of the field a footpath leads, and from this entrance to the public road going through the village of Denny there is a cart road. The inhabitants of Denny had for the prescriptive period used the water of the well for domestic purposes, and had had the well, *inter alia*, cradled with stones at their own expense. Up to 1877 Denny was a mere village without any burghal territory. But in that year Denny, with the adjoining village of Dunnipace, was constituted a police burgh under the provisions of 25 & 26 Vict. c. 101, and the police commissioners of the burgh then became the local authority under the Public Health (Scotland) Act, 1867 (30 & 31 Vict. c. 101).

In 1878 the commissioners, in their character as local authority, and under the authority of sub-sect. 4, sect. 89, of the last-mentioned statute, caused the well to be covered in with an iron plate, and placed therein a hand pump with the avowed object of keeping the well free from pollution. The proprietor of the field, alleging the well to be his private property, raised a process of interdict and suspension against the local authority praying for removal of the cover and pump, &c.:

Held, affirming the decision of the court below, that the well was a public well within the meaning of the statute, and that the local authority, as representing the inhabitants, had not done anything in excess of their powers.

[5 Appeal Cases, 519.]

H.L. (Sc.), March 12, 1880.

[HOUSE OF LORDS.]

***M'DONALD and Another, Appellants; M'DONALD, Respondent (').** [519]

Entail—Disentail—Value of "Expectancy or Interest" of Second and Third Heirs Substitute—Relevancy of all Facts calculated to affect the Life of the First or Intermediate Heir—Chance of succeeding to the Fee Simple to be calculated—Entail Amendment (Scotland) Act, 1875, s. 5, subs. 2.

The heir in possession of an entailed estate in Scotland petitioned under the statutes for disentail. The first heir substitute gave his consent, but the second and third refused. In valuing the interest of the second and third heirs substitute, under the 5th section of the Entail Amendment (Scotland) Act, 1875, the questions arose (1) whether the probable duration of the life of the first heir substitute should be taken from the tables on the basis of his actual age, or whether his actual state of health should be ascertained by inquiry; he refusing to be medically examined, and the second and third heirs alleging that he had suffered from ailments which tended to reduce the probable duration of his life greatly below the average of persons of his age. And (2) whether, there being only one other heir in the entail existing, the second and third heirs' chance of succeeding to the fee simple by surviving all the other heirs of entail should be taken into account:

Held, reversing the decision of the court below, (1) that all the facts tending to reduce the first heir's life below the average were relevant and should be taken into consideration; and (2) that the chance of succeeding to the fee simple ought to be valued.

APPEAL from the Second Division of the Court of Session, Scotland. (a)

*The respondent objected to this report in respect, [522 *inter alia*, that the actuary had greatly over estimated the number of years which should in his calculation be added to Captain M'Donald's age; and (2) in respect the actuary had estimated the chance of the appellants "acquiring the fee simple of the estate by surviving all the other heirs in the entail." The appellants also lodged objections, but these were not material to the points here.

The Lord Ordinary (i) substantially sustained the report. A reclaiming note was taken by the respondent to the Second Division, and it having been mentioned that Captain M'Donald was willing to be medically examined, their Lordships, on the 16th of January, 1879 (Lord Gifford dissenting), found that the chances of Captain M'Donald's life ought in respect of Captain M'Donald's consent, to be ascertained in the ordinary way by such professional *ex- [523

(i) Modifying Court Sessions Cas., 4th Series, vol. vi, p. 521. (i) Lord Adam.

(a) Only so much of the case as bears upon the question of the effect of the life tables is given. N. C. M.

amination and report as the Lord Ordinary may direct. And on the second question their Lordships sustained the objections for the respondent, that the chance of acquiring the fee simple ought not to be taken into account (*).

After some further proceedings it turned out that Captain M'Donald, who resided near Liverpool, declined to be examined except on the condition that the examiner bring an autograph letter of authority from General M'Donald, the respondent and petitioner. This letter General M'Donald declined to write, and the Lord Ordinary having verbally reported the case to the Second Division, their Lordships, on the 19th of March, 1879, remitted to the Lord Ordinary to proceed with the cause, on the footing that Captain M'Donald's life was to be assumed to be an average life, and to be estimated according to his present age (*).

A further report was prepared for the purpose of carrying out the above judgments of the 16th of January and the 19th of March, and the reporter ultimately found the value of the appellants' interest and expectancy to be respectively £973 and £745.

Feb. 10, 12. Mr. *Benjamin*, Q.C., and Mr. *J. P. B. Robertson* (of the Scotch bar), for the appellants.

525] *Mr. *Horace Davey*, Q.C., and Mr. *J. B. Balfour*, of the Scotch bar (with them Mr. *J. M. Collyer*), for the respondent.

528] *Mr. *Benjamin*, Q.C., in reply.

The Law Peers having taken time to consider their judgments delivered the following opinions:

EARL CAIRNS, L.C.: My Lords, the respondent, General M'Donald, is heir of entail in possession of certain estates in Perthshire, held under a tailzie dated 1837. The nearest heirs of entail entitled to succeed to the estates after the respondent are his brother, Captain M'Donald, and his sisters, the two appellants.

The respondent has applied to the Court of Session for authority to disentail these estates. He has obtained the consent of Captain M'Donald, the next heir of entail, and as the appellants, the second and third heirs of entail, do not consent, it is necessary, under the Entail Amendment (Scotland) Act, 1875, that the value in money of their expectancy or interest in the entailed estate should be ascertained to the satisfaction of the court, and paid to or secured for them.

(*) Court Sess. Cas., 4th Series, vol. vi, p. 521.

(*) Ibid, p. 869.

The court has valued the interest of the first appellant at £973, and of the second at £745, and upon these sums being paid into the bank, has dispensed with the consent of the appellants and approved of an instrument of disentail.

The question is, whether the expectancy or interest of the appellants has been valued on correct principles.

Your Lordships are aware that under the Rutherfurd Act a Scotch entail created before 1848 could not be broken or opened without the consent of the three nearest heirs of entail; so that if the act of 1875 had not passed the consents of Captain M'Donald *and the appellants would have [529 been necessary, and the dissent of any one of the three would have prevented the disentail.

The first question as to value relates to the life of Captain M'Donald. He was born in 1834, and is married, but has no issue. The appellants offer to prove that Captain M'Donald, though at present in good health, has suffered from ailments which reduce his prospect of life greatly below the average of persons of his age. The respondent, on the other hand, contends that Captain M'Donald's life should be taken as an average one, according to proper life tables, and this has been the opinion of the majority of the learned judges.

I am sorry that I cannot concur in this opinion. It might have been a convenient and reasonable course for the Legislature to have laid down some rule by which these expectancies or interests should be valued, and the Legislature might have said that in all cases the probable duration of life should be calculated according to some of the well-known tables, but it has not done so. In that state of things it appears to me that the appellants have a right to bring before the court, or before any actuary or valuer to whom the case is referred, any facts relevant to the probable duration of Captain M'Donald's life; and his state of health, and the ailments from which he has suffered, if calculated to shorten life, must be relevant to such an issue. I see no inconvenience in this course to the respondent. The onus of proof will be upon the appellants. The respondent will prove the age of Captain M'Donald, and the probable duration of an average life at that age; and it will be for the appellants to prove that Captain M'Donald's is not an average life, and why.

The other point in dispute arises in this way: A younger sister of the appellants, Jemima M'Donald, is the fourth heir of entail, and she is now the last in the entail. If she should be dead without issue when the appellant, Adriana,

the third heir of entail, succeeds, if she does succeed, then Adriana will be absolutely entitled to the fee of the estates, whereas if Jemima or any of her issue are in existence at that time, Adriana will be virtually no more than a life-renter, unless she obtains the consent of Jemima or her issue to disentail. The same would be the case as to the appellant Elizabeth if she were to survive Adriana.

530] *It is contended by the appellants that in valuing the interests of Elizabeth and Adriana their interests should not be treated as those of life-renters only, but the possibility should be taken into account that when the survivor of them comes into possession Jemima may be dead without issue.

The Court of Session were of opinion that this was not an element of value which ought to be considered. My Lords, I am unable to concur in that view. The question, I think, to be asked is this: supposing the act of 1875 had not passed what would have been the interest which the appellants would have enjoyed in specie, supposing they had refused their consent to disentail. It cannot be doubted that what the surviving appellant would have enjoyed would have been an interest equal to a life-rent, or equal to a fee, just according as Jemima was or was not at the time dead without issue. This is the amount of interest that would have been enjoyed in specie, and this, as it appears to me, is the interest that must be valued. If a Scotch estate was entailed on A., a bachelor of seventy, then on B., a spinster of seventy, then on C., a spinster of seventy-five, and an act of Parliament required "*the expectancy or interest of B. in the entailed estate*" to be valued, I cannot doubt that the valuer must have taken into account that when B. succeeded, C. might be dead, and the estate of B. an unshackled fee. The valuation in the case before your Lordships may, and probably will, be a matter of difficulty, depending as it does on contingencies not merely of death but of marriage and of having issue; but this is the task which the Legislature has assigned to the court, and however difficult it may be it must, in my opinion, be discharged.

My Lords, I think the interlocutors under appeal should be altered, but I have felt much doubt as to the form in which the alteration ought to be made. The case is one in which the interposition of any delay may lead to serious alteration by death or otherwise in the rights of the parties, and on the other hand it may be that the respondent will not desire to disentail if he has to pay a larger sum for consents than the sums already approved by the court. The

actuary to whom the question of valuation was referred by the court, at a time when he took into account the elements which I think ought to enter into the calculations, *put the value of the interest of the appellants at [531 £9,114, if I rightly understand the figures, and I understood at your Lordships' bar the counsel for the appellants to say that if this sum were secured they would be willing to consent to the immediate disentail, the inquiry into the exact value taking place afterwards. If, therefore, your Lordships concur with me as to the principle of the valuation, I should propose a motion in this form: The appellants consenting to an immediate disentail of the estates in question on the terms of the respondent paying within twenty-one days into the British Linen Company's bank the sum of £9,114 as a security to answer the valuation hereinafter directed to be made, declare that, in the event of such payment being made within the time aforesaid, the interlocutors of the 31st of May, 1879, and the 7th of June, 1879, so far as they approve of the instrument of disentail, No. 22 of Process, and interpose authority thereto, and grant warrant for recording same in the Register of Entails be affirmed, and in that event refer it to the Court of Session to ascertain anew the value in money as at the date of the instrument of disentail of the expectancy or interest of the appellants in the estates within the meaning of the Entail Amendment (Scotland) Act, 1875. In the event of payment of the said sum of £9,114 not being made within the time aforesaid, reverse the interlocutors appealed from *simpliciter*. In either case the respondent to pay to the appellants the costs of this appeal.

If I am wrong in the figures which I have used (£9,114) the parties will correct me; and I wish also to add that I have taken these figures merely because they were given by the actuary, and not as adopting either the mode or the result of his calculation, which the court may see fit on the new inquiry not to adhere to. The sum arrived at by the actuary certainly appears to be, under the circumstances, a very large one.

LORD HATHERLEY: My Lords, two points, each of them of considerable importance, have arisen in this case which comes before us upon an appeal from a decision of the Court of Session in Scotland in proceedings which were taken there under the act commonly called the *Rutherford Act, [532 and the subsequent amending act of 1875 as to the disentailing of estates in Scotland. I shall not enter at length into

the nature and effect of those two acts, but I will proceed at once to consider the questions which have been raised in this appeal.

The estate in question is subject to an entail created by Major-General M'Donald. The General is in possession by virtue of that entail, and the three next in succession to him are his brother, Captain M'Donald (the nearest heir), his sister Elizabeth Moore Menzies M'Donald, and his sister Adriana M'Donald. These two ladies not having consented (Captain M'Donald has) to a disentailing of the estate in question, it became necessary to ascertain under the act of 1875 the value in money of their expectancy or interest in the entailed estate with reference to the application of General M'Donald. In making this valuation it became necessary to value also the interest of the first heir next to the heir in possession, that is, the interest of Captain M'Donald. The first of the two questions which I have referred to is, Whether in valuing the life of Captain M'Donald, who was the first heir next to the heir in possession, the actuary should value it simply according to the tables which are used by actuaries for estimating contingencies of this character as an expectation of life simply measured by the age of the subject, or whether the state of health and other matters affecting life should also be taken into consideration in arriving at the value. I think that it is impossible to exclude evidence strictly applicable to the particular circumstances of the case and tending directly to affect the probable duration of life from such an inquiry as the act of 1875 prescribes. Many cases may occur or may be suggested in which it is all but certain that the ordinary expectation of life of a man of a given age would not represent the probable value of the life of a selected individual. The table averages were in fact at first deduced from the total number of men of a given age in all possible states of health and any one life which is selected may be the lowest of the class as regards health. I think it is right to admit the evidence of the calculated tables applying to any given age as *prima facie* proof, but it should be open to the other side to lead proof of facts manifestly affecting the alleged average in the particular case. 533] *For instance, take the case of a man known to be on his death-bed with consumption; the value of the expectation of life, according to the tables, would not at all represent the true value in that particular case. If you take at the average value any one life out of a class upon which the average is taken, and disregard the circumstances affecting that individual, the effect may be to arrive at a

valuation in some cases far above and in other cases far below the actual value of that particular life. I do not see how under the words of the act an inquiry into facts manifestly affecting the alleged average in the particular case can be shut out.

The second point which has arisen has occasioned me much more doubt and hesitation than the first point; it is this: The first three heirs being the captain and his two sisters, the fourth heir in the entail is another sister named *Jemima*. According to the act of 1875 her interest is not to be taken into account; but if she should die without issue in the lifetime of either of her sisters, then the sister on coming into possession as heir of entail will be entitled to deal with the fee simple free from the fetters of the entail. Should this interest be valued as part of the interest of either of those sisters under the directions of the act of 1875, namely, as "an interest or expectancy in the entailed estate" with reference to this disentailing application?

I have had the opportunity of seeing the opinions of your Lordships, who, with me, heard this matter argued, and I have read with great attention the opinions of the judges in the court below, and I have, though with much doubt, come to the conclusion that the view contended for by the appellants is right. As I read the two disentailing acts of Parliament, they seem to have proceeded on the principle that the long periods of entail sanctioned by previous legislation and by the previous state of the law ought to be abridged, but at the same time, that such abridgment should take place with a due regard for vested interests, in so far as they would not frustrate the purpose of the act itself, namely, the intended earlier release of entailed estates from the fetters which virtually excluded them from commerce. In the *Rutherford Act* a system of consents was established by which the heir in possession might acquire the unfettered dominion. These *consents were to be the consents [534 of the first three substituted heirs in succession after the heir in possession. This act, however, gave no control to the heirs beyond three which could prevent the disentailing of the property. The act of 1875 modified this arrangement by directing that the immediate heir next to the owner in possession must give his consent, or else the disentailing instrument should not be allowed, but that the next two heirs, if they would not, or from disability could not, consent, should be bound by a deed approved of by the court, provided that the court satisfied itself of the value of the expectancy (in the words I have mentioned) and that such

value was secured to the satisfaction of the court. This being done, the fourth and subsequent successive heirs were barred by the allowance of the deed. The effect of this enactment was to disregard altogether the interests more distant than that of the third heir in expectancy.

The question now before your Lordships is of a somewhat singular character, regard being had to the circumstances, namely, whether an interest which arises in the third heir, only in consequence of the interest of the fourth heir and subsequent heirs being exhausted, namely, the chance of the fourth heir dying before the third heir and without issue, should be valued? Suppose the fourth heir to be the last, so that there is no heir beyond the fourth who could insist on the fetters imposed on the estate being brought into effect when it comes to the third heir, the question is whether this is an interest or expectancy directed to be valued by the act of 1875. Is it an "interest or expectancy in the entailed estate?"

The Legislature, in its desire to achieve the object it had in view, namely, the liberation of estates subject to entail, has nevertheless, both in the Rutherford Act and in the act of 1875, intimated the extent to which it thought justice required consent in the one case, and compensation in the other in respect of vested interests, stopping at such a degree of interest as any third substitute heir could acquire by the entail, or, as it is expressed in the act, "in the entailed estate." It appears to me probable that what the Legislature was aiming at was the entailed estate only as created by the deed of entail, and the interest now in question is an interest which is beyond the entail, and indeed, *after the interest in the estate tail has passed into the second or third heir and is only arrested at the decease of the third heir by the fact of the next or fourth heir or his issue not being in existence to receive it, and that the interest which the third heir may acquire and dispose of by reason of the termination of the estate tail taking place immediately on the death of Jemima (the fourth heir substitute) without issue, is the original fee simple which has been allowed to remain fettered so far as to carry it in its fettered state to the third heir in succession, but which became free from the fetters when it had reached the third heir, who founds her claim not as interested in the entail but as the unfettered fiar and mistress of the estate from the failure of the entail.

We have the singular result of an interest in the third heir which is to be valued under the act of 1875, and which results from the failure, not of prior but of subsequent limi-

tations to the fourth heir, which would not be the subject of any compensation if vested in that heir herself. I feel great difficulty in coming to such a conclusion. The only case cited before us is that of *De Virte v. Wilson* (¹), which certainly seems to have proceeded on some such view, but we have in the present case the opinions of the majority of the judges in the court below in favor of that view, and I feel the words of the act—"expectancy or interest in the entailed estate"—very strong, and though I should, from the nature and purport of the two acts of Parliament, be led to the conclusion that so extended a meaning ought not to be given to them; yet the words used would be sufficient to include all the interest in the estate coming to her by the results of the entail and taken from her by the act.

I have had to consider what from the nature and the purport of these two acts of Parliament would be the reasonable and probable construction of the words I have referred to, and I do feel strongly that the nature and intent of the acts of Parliament are so very clear that I should have expected to find a different legislative enactment when we come to the enacting part on which this particular question arises. At the same time I cannot say that I find words in the act that would support the meaning which some of the learned judges in the court below thought the words I have *referred [536 to would bear. If I came to the other conclusion I should have to do so upon a very forced construction, because although it is not the entail itself which causes this reversionary interest, as we should call it in England, to fall into possession, still it is in consequence of the reversionary interest that the estate tail cannot be barred, for the court is not authorized to allow it to be barred, except upon the condition of having the whole "interest or expectancy" of the person against whom they allow it, valued according to the position which he or she may occupy at the time when the disentailing deed is proposed to be executed. Any changes which may have taken place, must have all proceeded from the effect of this disentailing deed, and it is owing to the effect of the disentailing deed, that this lady acquires her interest in the estate. I think this interest in the estate is part of the "interest or expectancy in the entailed estate" directed to be valued.

Therefore, it appears to me that we must hold, as my noble and learned friend on the woolsack has proposed, that the decision of the court below as to the valuation of this interest was erroneous in so far as it omitted the valu-

(¹) Court Sess. Cas., 4th Series, vol. v, p. 328.

ation of this particular interest, which appears to be not only a substantial interest but one of very considerable value and importance. Moreover, this is a question of principle, and one probably of not very infrequent occurrence; therefore it is well to settle it at once by a decision of your Lordships' House upon the subject. I agree therefore in the order which my noble and learned friend the Lord Chancellor has suggested to your Lordships. I think that the right time for the valuation to begin is the date of the execution of the deed, because as soon as the deed is executed it takes its full effect upon the conditions being complied with. It will not take its full effect until certain conditions have been complied with, but when they have been complied with it will immediately take its full effect, and its full effect will begin from the date of the execution of the instrument itself. Subject to the figures being correct, as to which I am not prepared to express a clear opinion, I think that the proposed order is right. As regards the costs of the appeal, the appellants having succeeded in the case they have brought to your Lordships' bar, must have their costs. According to the common rule, the unsuccessful party must bear the costs of the appeal.

537] *LORD BLACKBURN: My Lords, the respondent is heir of entail in possession of an estate held by virtue of a tailzie dated prior to the 1st of August, 1848. Before the 11 & 12 Vict. c. 36, commonly called the Rutherford Act, lands might in Scotland be fettered in perpetuity. That act was passed on a preamble reciting that "the law of entail in Scotland has been found to be attended with serious evils, both to the heirs of entail and to the community at large."

The first section provided that entails made by deeds of tailzie dated after the 1st of August, 1848, might be barred by an heir in possession, whenever that heir was born after the date of the entail and being of the age of twenty-five, or when he could obtain the consent of an heir apparent born after that date and of that age; and the second section gave a precisely similar power as regarded entails made by deeds of tailzie before that date when the heir in possession or heir apparent was born after the 1st of August, 1848. But if this had been all that was done, the evils arising from so large a portion of land in Scotland being already under the fetters of tailzies would have continued till the 2d of August, 1873, when first it became possible that an heir of the full age of twenty-five born after the 1st of August, 1848, could exist.

From that time the estates bound by the fetters of entail

made before the 1st of August, 1848, would continually diminish in number as heirs either in possession or heirs apparent born after the 1st of August, 1878, attained the age of twenty-five. Such entails would not necessarily come to an end till the lapse of a lifetime from that date, though the number remaining sixty years after 1848 would probably be very few. It was thought proper to make provision for an earlier unfettering of such estates; and by the 3d section it was provided that an heir of entail in possession under such a tailzie might disentail, if he could obtain the consents of the three nearest heirs who at the dates of such consents were for the time entitled to succeed to such estate; and by sect. 31 the Court of Session might appoint a guardian to any such heir under incapacity, who should be entitled, "with or without consideration," to consent for that heir.

I think the object of the Legislature was to enable the lands to be disentailed, but to give each of the three first heirs an unfettered *discretion as to whether they [538 would protect the entail or not, and to allow him to bargain as he pleased with the heir in possession. Such an heir may, and I believe often does, refuse his assent, from a belief that he ought not to disturb the provisions of the person from whom he derives his interest in the estate, or because he thinks it more for the interest of the family to preserve the entail. When no such motives for refusing consent existed an heir probably sometimes drove an extortionate bargain. But the heirs whose consent was asked for often, and I suppose the guardians of an infant heir on his behalf, usually said that they required to be paid the fair value of their consent, but would not ask more; and, consequently, actuaries were often asked to put a value on such consent, depending, as it necessarily did, in a great degree on the probabilities of the duration of life, marriage, and issue. No such valuation, however, could in any way be brought under the review of a court.

I do not think it necessary to say more about the Rutherford Act, the provisions of which are in this case only material in as far as they aid in construing the act of 1875 which amended that act, and must be construed along with it. The terms of that act must be fully in the minds of your Lordships, and I need not read them. I think the object of the Legislature must have been to give further facilities for freeing lands entailed from the fetters imposed on them by entails prior to 1848. Those lands are yearly diminishing in number, as heirs born after 1848 become either heirs in possession or heirs apparent. But it seems to have been

thought that the process by which such lands were unfettered was too slow. The age at which an heir in possession or apparent could consent was reduced to twenty-one, and the nearest heir alone was left in the position of having an absolute right to forbid the disentailing; and the Court of Session was empowered to dispense with the consent of the second or the third heir, but a condition precedent was attached to the exercise of this power. The court is required "to ascertain the value in money of the expectancy or interest in the entailed estate with reference to such application (i.e., the application of the heir in possession to disentail the estate) of such heir refusing to consent." It is on the true construction of this provision that this case depends. 539] *The appellants have only raised two points as to the mode in which the valuation has in this case been taken in such a way as to bring them before this House. If in both of those the Court of Session is right, the valuation (whether objectionable on other grounds or not) stands good, and the appeal must be dismissed. But if in both or either of these points the Court of Session has in the opinion of this House gone wrong, the valuation as made is not right. And, as I think, though the Court of Session are to decide summarily, they are to decide judicially, and any error in principle will prevent the valuation from standing; and so, if both or either is wrong, it will fall to be considered what is to be done. I cannot pronounce judicially on any point except those two brought before this House, and I wish to avoid expressing any opinion on such points except in so far as it is necessary to consider them with a view to disposing of those two points.

The Legislature has cast on the Court of Session the task of "ascertaining the value," and when it is "ascertained to the satisfaction of the court," tells them what to do. But the Legislature has given no directions at all as to how or in what manner the court is to ascertain the value. In the Succession Act (16 & 17 Vict. c. 51, s. 21), it is directed that interests during periods depending on lives shall be estimated according to the value given in certain tables annexed to that act, so as to leave nothing to be ascertained except the age of the parties. Nothing of the sort is done in this act.

But I think the Legislature knew that the value of an expectancy must, in a great degree at least, depend on the probabilities of the duration of life, the chances of marriage, and the chances of such marriages proving fruitful. They must, I think, have known that actuaries had tables, founded on extensive experience, on which they acted,

which enabled them to value with considerable accuracy the probabilities of life; and that though the experience on which calculations as to the probabilities of marriage and issue were based was much narrower, and the results more subject to uncertainty, yet that some calculation could be made in that way and none could be made in any other. I think therefore that the Legislature must have contemplated that the court would call in the assistance of an actuary *to report to them on all those matters which [540] properly come within the province of an actuary. Such was the course taken in *De Virte v. Wilson* ⁽¹⁾, the only other case in which as yet the court has had to act; and such was the course taken in the present case. No objection was made on either side, but I do not think any could have been taken on either side. But when questions not properly determinable by an actuary arise, I think they must, unless the parties have agreed to take the actuary as arbitrator, be ascertained in the manner appropriate to the particular question. In this case, when a question as to the value of the lands arose, the court did not refer that to the actuary but to a valuer.

The first thing to be ascertained by the actuary in this case was the probability of the heir in possession, the respondent, dying without male issue in the lifetime of each of the appellants; for unless he did so they could get nothing. No point has been raised as to the mode in which this has been finally ascertained.

The next thing to do was to ascertain the probability of the nearest heir, Captain M'Donald, so dying. The age of the Captain, the fact of his being married, and the age of his wife, were not finally disputed. But the agent for the appellants brought before the actuary this statement: "As regards Captain M'Donald himself, it is right to bring under the notice of the actuary the facts that in the year 1858 he fell over the cliffs at Kinsail and injured his head, and that he subsequently suffered from concussion of the brain. Abscesses formed in the wound which was made by the fall, and splinters of bone came away from time to time. In consequence of this fall he was an invalid for many months. He subsequently was obliged to leave the army, in consequence of a medical board deciding that after his accident he could not stand a warm climate; and at or about that time he suffered very much from the heat at Gibraltar where he was stationed. Since his discharge from the army he has been in very bad health, and subject to epileptic fits, and on

(1) Court of Sess. Cas., 4th Series, vol. v, p. 328.

several occasions his life has been almost despaired of. He had one of these fits so late as April, 1877, at which time it was not expected he would survive. These circumstances, 541] it is submitted, *go materially to reduce the value of the life interest of Captain M'Donald."

The contention of the respondent is that the actuary ought to proceed solely on the statistics relating to the value of an ordinary life, and that every other averment is irrelevant. I think the Legislature might have enacted this, but I think they have not; and I think it is impossible to hold that no exceptional case can vary the calculation. An extreme case may test this principle: An heir may be a young man, the expectation of whose life would be forty or fifty years. Suppose it to be averred that before the application to disentail the estate is made he met with an accident occasioning injury to the spine inducing incurable paralysis, so that he must pass the remainder of his life on a couch, and though he may linger for a time cannot live long, would it be proper to say that no inquiry should be made into such an allegation as this? Lord Gifford (*) shrinks from pushing his argument so far, and I think with reason. I think that the probability of life of an average man of that age is *prima facie* the proper basis of an actuary's calculation. And I think Lord Ormidale seems not to deny that there may be cases in which there may be such insuperable difficulty in ascertaining the effect of exceptional circumstances on the value of the life as to leave no alternative but to take the actual age (*).

I agree with Lord Gifford that the court ought not to attend to every allegation of something on which a guess might be made. I think it must be something on which the court thinks an estimate may be reasonably made. It is easier to put cases as to the expectancy of marriage or issue, in which it would be proper to reject such averments, than as to the expectancy of life. But I can put one. The probability of life of a man residing in England is certainly greater than that of the same man residing in the tropics. Insurance companies habitually act on this, and protect themselves by putting in their policies a provision that the policy shall be void if the assured, without their license, goes into prohibited districts,—I think generally between the 32d parallel of north latitude and the 32d 542] parallel of south latitude,—and *they grant such licenses on the terms that an increased premium shall be paid whilst he is within the prohibited space. Yet I think

(*) Court of Sess. Cas., 4th Series, vol. vi, at p. 875.

(*) Ibid, at p. 872.

that an averment that the heir of entail was a keen sportsman who would enjoy elephant shooting, or a man of scientific tastes who would like to explore the course of the Niger or the sources of the Nile, and was therefore likely to go to Central Africa, should be rejected as irrelevant,—not on the ground that his doing so would not affect the probability of his living, but on the ground that there could not be any reasonable estimate of the chance of his so travelling. In this I agree with the Lord Justice Clerk, and I agree with him in thinking that it would be proper in any other case to reconsider the propriety of the decision of the Lord Ordinary Rutherford Clark in *De Virte v. Wilson* ⁽¹⁾; under which the actuary was permitted to make a guess at the chance of Mrs. Wilson's children being, if she came into possession of the estate, liberal to her. In all other respects Lord Rutherford Clark's note on that case seems to me very sound.

But then I cannot think the averments here made are irrelevant on this ground. Had the only averment been that Captain M'Donald had twenty years ago met with a bad accident I might have hesitated. But it goes much farther. It is said that "he has been in very bad health and subject to epileptic fits, and on several occasions his life has been almost despaired of. He had one of these fits so late as April, 1877, at which time it was not expected he would survive." It may be that the facts are greatly exaggerated; but if correctly stated it becomes, I think, a question for medical skill to say whether such facts, when ascertained, do not show that the vital energy has been diminished, and, if so, how much. I think if that is found it is a very convenient form to say as much has been taken out of his vital energy by this accident as would have been taken out of an ordinary man's vitality by so many years of ordinary life. And then it becomes a question for an actuary what difference that makes. In the first report of the actuary in this case he assumed without, I think, sufficient grounds or sufficient authority, that it had taken as much out of Captain M'Donald's vital energy as twenty years of ordinary life, and then came to the conclusion, which I suppose was correct, *that on that supposition about 70 per cent. [543 should be added to the value of expectancy of the appellants. When this case was before the Lord Ordinary, and when it first came before the Court of Session it was supposed that Captain M'Donald had no objection to submit to a medical examination. The interlocutor of the 16th of

⁽¹⁾ Court of Sess. Cas., 4th Series, vol. v, p. 328.

January, 1879, was framed in conformity with the views of the Lord Justice Clerk and Lord Ormidale, but contrary to the view of Lord Gifford. By it the court found the chances of Captain M'Donald's life ought, in respect of Captain M'Donald's consent, to be ascertained in the ordinary way by such professional examination and report as the Lord Ordinary may direct, and remit to the Lord Ordinary to give effect to them, and to proceed with the cause and reserve all questions of expenses.

It seems to me that this was a proper and sensible course to take. It turned out, however, that Captain M'Donald did not choose to be examined, and on that change of facts the Lord Justice Clerk changed his opinion as to the proper course to be pursued, and this interlocutor was recalled, and another substituted. "19th March, 1879. Remit to the Lord Ordinary to proceed with the cause on the footing that Captain M'Donald's life is to be assumed to be an average life, and to be estimated according to his present age, and also remit to the Lord Ordinary to dispose of all questions of expenses."

It was argued at the bar that without a personal examination of Captain M'Donald no medical opinion could be formed. In this I cannot agree. I do not doubt that it would be more satisfactory that such a personal examination should take place, and I hope that Captain M'Donald will not persist in his objection; but I do not think it indispensable.

I have no skill in medicine myself; but both in civil causes and in criminal causes I have had many medical men give their evidence before me, and I think I am warranted in asserting that they in their diagnosis attach much importance to the history of the case—the antecedent facts. These they must in general ascertain as they best can. But a medical man finding a patient suffering from symptoms, and learning that he had recently been a passenger in a railway train when an accident happened, would not disregard that fact, and might probably on that fact think that
544] *the symptoms indicated the effect of a shock to the brain. If there was no such fact, but he learned that just before the illness came on the patient had been working in an ill-ventilated mine, or even sitting for hours in an ill-ventilated court or theatre, he might on that fact think that the symptoms indicated the effect of blood poisoning. In the present case I should expect that a medical man, either ascertaining for himself, if the court refers it to him to do so, or learning from the findings of the court what the facts

were, might say, "The illness of Captain M'Donald in April, 1877, may either have only indicated that he ought to take care not to expose himself to the sun, but if he does take such care he may live as long as any one else; in which case I do not see how any estimate can be put on the diminished value of his life. Or it may have indicated that his constitution was impaired. If I had to judge only from the symptoms as reported to me I should have inclined with some doubt to one of these opinions," stating which it was. "But learning that during the three years that have since elapsed Captain M'Donald has been in good health," or "has been suffering repeated though slight attacks of the same sort" (as the case may be), "I am confirmed in that opinion," or "I am convinced that that opinion was erroneous." I think, therefore, it is important, in remitting the case, so as to obtain the assistance of a medical man, to provide how such facts, which I think must be important, are to be ascertained.

The second point is one which may be treated more concisely. The heir in possession of an entailed estate in Scotland is the fiar, fettered as far as the provisions of the tailzie fetter him, and no further. If there is no one in existence who can enforce these fetters, he has the absolute fee. From this it follows that if it can be ascertained that all the heirs in existence will die without issue, the last survivor of the existing heirs will have the fee. A person who is in a tontine has a calculable interest in his expectancy of being the last survivor. Ought the analogous expectancy of one of the three heirs of entail to be the last survivor to be valued in this case, where there are four existing heirs after the heir in possession? The actuary has in this case valued it, and (what I should not have anticipated) found that it more than doubles the sum to be paid to these ladies. On objection the *Lord Ordinary thought he had [545] done right. But all three judges of the Second Division were of a contrary opinion. I have doubt and hesitation on this point, and if it rested solely with me I am not prepared to reverse their decision that this should not be valued.

The Rutherford Act proceeded on the assumption that the interests of the fourth heir under the fetters of the entail were too remote to make it proper to consult him as to the propriety of disentailing. This interest of the ladies only arising after the fourth heir has died without issue is still more remote. The words used in the amending act of 1875 are not such as to make me believe that those who used

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them had the point present to their minds. But the object of the act being to facilitate the disentailing of estates, if the words used are such as to be capable of bearing the construction that the only thing to be valued is the expectancy under the fetters of the entail whilst they exist, and not the expectation of the fee that may arise after they have expired, I think we should put on the act of 1875 that construction which will forward the object of the act. But I am not prepared to dissent from what I understand to be the opinion of both the noble and learned Lords who heard the argument, that the words of the act are not such as to be capable of bearing that construction.

Lastly comes the question what is now to be done? I do not think that the valuation obtained on a wrong principle can stand. And if that is set aside simply, the disentail which has been made cannot stand. But if one of the heirs should die during the protracted litigation, the object of the petitioner, the respondent, is baffled; and I think that should not be allowed. The respondent, though willing to pay the sum at which the court has valued the interests of the two ladies, may not be willing to pay four times that amount. If so, the Court of Session will have to say what is to be done as to the costs incurred under the petition. If he is willing to pay whatever be ultimately found to be the value, I think it would be the reasonable course that he should pay into the bank, or otherwise secure to the satisfaction of the Court of Session, a sum equal to the utmost amount which it is probable will be added to the value at 546] present come to, and that the litigation *should proceed (if the parties wish it, which I hope they may not) as to that sum, the estate remaining disentailed. I think the form of order proposed will be proper if the sum mentioned is the right figure. I have not investigated that.

The costs of the appeal to this House should, I think, be given to the successful party, that is, the appellants.

Counsel for the parties (Mr. Benjamin and Mr. Collyer) having stated that the exact amount made out by the actuary, taking into account Captain M'Donald's prospect of life and the chance of the appellants succeeding to the fee simple, was £8,122, the following judgment was delivered:

The appellants having (by their counsel) consented to an immediate disentail of the estates which form the subject-matter of the appeal, on the terms of the respondent, paying within twenty-one days into the British Linen Company's bank such a

sum as with the sum already deposited will make up the sum of £8,122, as a security to answer the valuation hereinafter directed to be made :

It is Declared and Adjudged, that in the event of such payment being made within the time aforesaid, the said interlocutor of the Lord Ordinary in Scotland, of the 31st of May, 1879, and the said interlocutor of the Lords of Session there, of the Second Division, of the 7th of June, 1879, complained of in the said appeal, so far as they approve of the instrument of disentail No. 22 of Process, and interpose authority thereto, and grant warrant for recording same in the Register of Entails, be affirmed : and in that event, it is *Ordered*, that it be referred to the Court of Session in Scotland to ascertain anew the value, in money, as at the date of the instrument of disentail of the expectancy or interest of the appellants in the estates, within the meaning of the Entail Amendment (Scotland) Act, 1875. In the event of payment of the said sum not being made within *the time [547 aforesaid, it is *Declared and Adjudged*, that the interlocutors complained of in the said appeal be reversed *simpliciter* : and it is *Ordered*, that the said cause be, and the same is hereby remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration and judgment : and it is further *Ordered*, that in either case the respondent do pay or cause to be paid to the said appellants the costs incurred in respect of the said appeal, &c.

Lords' Journals, 12th March, 1880.

Agents for appellants : *Grahames, Wardlaw & Currey*.

Agent for respondent : *Andrew Beveridge*.

See 10 Eng. R., 662 note.

Tables proved to have been used by life insurance companies by one who has been in the business for years, though not claiming to be an expert as to the tables, are admissible to show the probabilities of the duration of life: *Central Railroad v. Richards*, 62 Geo., 306.

In an action to recover damages occasioned by the death of the plaintiff's intestate, the Northampton tables are

properly received in evidence to show the probable duration of the life of the deceased : *Sauter v. N. Y. Central*, 6 Hun, 446, 451, 66 N. Y., 50 ; *Davis v. Standish*, 26 Hun, 608, 14 N. Y. Weekly Dig., 411.

So the Carlisle tables : *Walters v. C. R.*, etc., 41 Iowa, 71 ; *Simonson v. C. R.*, etc., 49 Iowa, 87.

In arriving at the damages for breach of a contract by a son to furnish the mother annually with certain articles

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secured by mortgage as it is not for the support and maintenance of the mother, but for certain specified articles annually, the proper remedy is not a rescission of the contract, but for a foreclosure of the mortgage and sale of the premises to make the amount of damages accrued for past breaches, together with the present value of the annuity which the mortgagor's covenants bind him to pay plaintiff for the remainder of her life. In computing the present value of such annuity, there was no error in using the Northampton tables, in the absence of any statute or rule of court on that subject: *Peterson v. Oleson*, 47 Wisc., 122.

Though not put in evidence, the court may take judicial notice of the Northampton tables: *Davis v. Standish*, 26 Hun, 608.

In computing the estate of a dowress, her probabilities of life may properly be calculated upon the mortality tables published in the compiled laws, unaffected by any consideration as to her precise condition of health; these tables being made up by averaging lives by the actual mortality of strong and sickly alike, any attempt to refine upon these averages by guessing at the probabilities of a given life, would be too fanciful and conjectural to deserve attention in determining legal rights: *Brown v. Bunson*, 35 Mich., 416.

In suit by an agent against an insurance company for damages resulting from his discharge during the term of his engagement, his measure of damages is the amount he has lost in consequence. And the testimony of actuaries as to the probable value of renewals for the remainder of his term, on policies already obtained, is competent in arriving at the result. But an estimate of his probable earnings thereafter, derived from proof of the amount of his collections and commissions before the breach, without other proof relating thereto, would be too speculative to be admissible. In such suit defendant may show in mitigation of damages that plaintiff was employed elsewhere after the breach, and the amount of compensation received by him while so engaged: *Lewis v. Atlas Mutual Life, etc.*, 61 Mo., 534, and the court (page 530) said:

"A custom or usage has sprung up and

exists with insurance companies, by which adjustments are made as to the value and renewals of policies for any given length of time.

By the use of statistical tables and comparisons, a remarkable degree of accuracy is obtained, and when a connection ceases between an agent and the company, it is the only mode of ascertaining or adjusting the agent's interest. The calculation by the actuary has been reduced to scientific principles, and it must be resorted to, else there would be a failure of justice on one hand or on the other, the damages would be purely speculative.

In *Ensworth v. The New York Life Ins. Co.*, 7 Am. Law Reg. (N.S.), 332; S. C., 1 Bigl. Ins. Cas., 645, an action was brought against an insurance company agent for breach of contract, whereby the company agreed to give the agent a certain percentage on renewals of policies, while they continued in force. It was held, that the action was sustainable, and that the probable duration of the policies might be proved; and a judgment was given for the full value of the commissions on the renewal premiums to become due, during their estimated probable lifetime, after deducting the costs of collection."

In ascertaining the proper sum to be paid in gross to a tenant in dower or by the curtesy, in commutation of such interest, the rules of the Court of Chancery, based on the tables by which life insurance companies are guided in their risks, should not be taken as an absolute guide; but, irrespective of the result of the application of the rule to the case in hand, the court should determine what, in that case, under the circumstances thereof, is a reasonable sum to be paid in commutation: *Cronkright v. Hanleubeck*, 25 N. J. Eq., 513; affirming, 23 id., 409.

The "Carlisle Tables" are not authoritative in a judicial investigation of the value of a life interest; in such investigations each case must depend on its own circumstances.

In this case the common law rule of one third of the capital sum was adopted as the measure of the life interest: *Slippen's Appeal*, 80 Penn. St. R., 301.

In this case the court said (p. 396): "As to the measure of life of Clayton

T. Platt, we may add that the Carlisle Tables are not authoritative. They answer well their proper purpose to ascertain the average duration of life, so as to protect life insurers against ultimate loss upon a large number of policies, and thereby make a profit to the shareholders. But an individual case depends upon its own circumstances, and the relative rights of the life tenant and remainderman are to be ascertained accordingly. A consumptive or diseased man does not stand in the same plane as one of the same age in vigorous health. Their expectations of life differ in point of fact.

A court therefore must ascertain the actual probable expectation of life of the party as he is, or must adopt some recognized approximate standard as its legal measure in order to capitalize the interest he is entitled to for life. In this case the Carlisle Tables, it is said, would give the value of the life estate or capitalized interest at \$6,534.60, leaving the fee simple estate worth but \$5,202. The disproportion is quite manifest. We are therefore disposed to take the old common law rule of one-third of the whole sum, as the present value of the accumulated interest for the life of Clayton T. Platt."

M., the general guardian of infants who were owners of an estate in fee, in lands in remainder, subject to the life estate of their mother. M. A. C. therein acting in concert with and by the aid and procurement of G. (who had purchased M. A. C.'s life estate), and W. applied to the court and obtained an order authorizing the sale of the interest of the infants in the land, and appointing M. special guardian of the infants for the purpose of the sale. At the time of making this application, M. A. C., the tenant for life, was very sick and not expected to live, which fact was well known to M. G. U., but was designedly concealed from the court. The order being obtained, M., as such special guardian, sold the property to U. for the sum of \$8,673.82, including the life estate of M. A. C. therein, which was estimated at \$6,601.44, leaving only \$2,028.30 to be paid or secured to the infants for their share of the purchase-money, after deducting \$50 for the costs of the proceedings. And U. was directed by the

order to pay said sum of \$6,601.44 to G. as the owner of the life estate of M. A. C. The next day after the order confirming the sale was granted M. A. C. died.

Held, that the order appointing M. special guardian of the infants was fraudulently obtained, and the same and all subsequent orders and proceedings founded and had thereon for the purpose of obtaining the title of the infants to such real estate, were annulled, vacated and set aside, and the said proceedings were adjudged and declared to be fraudulent and void: *Clark v. Underwood*, 17 Barb., 202.

Where a railroad company enters upon land for the purpose of constructing its road, it is proper for the court to lay down a rule as to the value of a life estate therein, as an independent estate entitled to damages. *Harrisburg v. Crangle*, 3 W. & S., 460, followed.

The true rule of valuing the damages as a whole, is the difference between the value of the property before the making of the road and its value after the road is made, as affected by it, and of this difference the life tenant is entitled to the proportion of the whole, which the value of the life estate bears to the whole difference. The net annual value of the premises, multiplied by the years of the life tenant's expectancy of life and reduced by calculation to a present cash value, is not an incorrect mode of determining the value of the life estate as compared with the value of the remainder in fee: *Pittsburg, etc., v. Bentley*, 88 Penn. St., 178.

A railroad company agreed to give D., during his life, a free pass over the road for himself and family. The railroad company subsequently refused to comply with its agreement, and D. brought an action to recover damages for the breach of the agreement. Held, that the pass, being the principal feature of the contract, was therefore made its chief subject, for it was the document to be furnished as the evidence of the plaintiff's right, and that no other rule could be applied to the case but damages for the refusal of the pass as the only cause of action, and this being single, to be compensated for such damages as a pass for life for

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D. and family would be worth. And that while it was difficult to estimate its value, because of the length of life and of the number of passages D. and his family might demand, yet certainly must be approximated to as closely as the nature of the case would admit: *Erie, etc., v. Donthet*, 88 Penn. St. R., 243.

[5 Appeal Cases, 548.]

J.C.*, April 6, 7, 8, 9; May 6, 1880.

[PRIVY COUNCIL.]

548] *HER MAJESTY THE QUEEN and Another, *Appellants*; and MANOEL DOS SANTOS CASACA and Others, *Respondents*.

ON APPEAL FROM THE VICE ADMIRALTY COURT OF SIERRA LEONE.

Slave Trade Acts—Seizure of Portuguese Ship in Harbor—Obligation of Seizor to justify his acts—Absence of reasonable Ground of Suspicion—Prima facie Evidence of Slave Trading—Treaty with Portugal—6 & 7 Vict., c. 53.

The "O.," a Portuguese vessel, was seized on the 5th of December, 1876, whilst lying at anchor in the harbor and port of F., in Sierra Leone, as liable to be forfeited for offences committed against the provisions of 5 Geo. 4, c. 113, and 36 & 37 Vict., c. 88 (the Slave Trade Act, 1873), but was subsequently released by the court on it appearing that she was not engaged in the slave trade, but was chartered and intended to carry free immigrants:

Held, on appeal, that the seizor was rightly condemned in costs and damages. Although certain articles on board (shackles, an extraordinary number of empty casks, an extraordinary quantity of rice and mats) are included among the equipments which are declared to be *prima facie* evidence of a vessel being engaged in the slave trade, both by the treaty between England and Portugal, carried into effect by 6 & 7 Vict., c. 53, and by the Slave Trade Act, 1873; yet the seizor having had the means from the surrounding circumstances and from the ship's papers of informing himself of the true character of the vessel, and the true condition of the men on board who were alleged to be slaves, had no reasonable grounds for the suspicion that the vessel was engaged in or fitted out for the purpose of the slave trade.

The obligation upon a seizor to justify the seizure under the Slave Trade Acts of a vessel plainly engaged in *bona fide* trade within a harbor is a very strict obligation.

The Ricardo Schmidt (1) approved.

A reasonable suspicion that the alleged slaves had been kidnapped on board with 549] the object of carrying them as free laborers, and not of consigning *them to slavery, would not have justified the seizure and detention of the vessel.

According to the true construction of the Portuguese treaties, the consent on the part of Portugal that certain articles mentioned in the first schedule to the Slave Trade Act, 1873, when found on board a Portuguese vessel, shall be considered as *prima facie* evidence of her being engaged in the slave trade relates only to vessels on the high seas, and does not extend to vessels in a foreign port or foreign territorial waters. The 4th section, therefore, of the act cannot be extended to a Portuguese vessel lying in British waters.

* *Present*:—SIR JAMES W. COLVILLE, SIR ROBERT J. PHILLIMORE, SIR BARNES PEACOCK, and SIR MONTAGUE E. SMITH.

(1) Law Rep., 1 P. C., 268; S. C., 4 Moore, P. C., 121.

[5 Appeal Cases, 564.]

J.C.*, April 20, 21; May 11, 1880.

[PRIVY COUNCIL.]

*JOSEPH PITTS, *Appellant*; and EDWARD LA FONTAINE, *Respondent*. [564]

ON APPEAL FROM THE SUPREME CONSULAR COURT AT CONSTANTINOPLE.

Consular Court of Constantinople—Procedure.

In a suit in the Consular Court of Turkey brought by the respondent against the wife of the appellant, for a sale of a piece of land in Prinkipo, with the mill and bakery erected thereon, and for the payment of three-fourths of the proceeds of such sale into court; it appeared—

(1.) That the respondent was trustee in liquidation in respect of three-fourths share only in the beneficial interest in the said property, which share was subject to a mortgage; the appellant, who was no party to the suit, being entitled to the remaining one-fourth share unincumbered;

(2.) That the defendant, having been originally a Turkish subject, had been made ostensible owner and trustee of the said property, in order to satisfy or evade the law of Turkey; but had thereafter by her marriage with the appellant become a British subject.

The court thereupon ordered, with costs against the defendant, on the 18th of July, 1874, that the whole of the property should be sold, and the whole of the proceeds paid into court. In 1876, however, the respondent sold the three-fourths share thereof to C., as agent of the mortgagee, by private contract, and received the purchase-money thereof.

On the 27th of March and 18th of June, 1878, the court granted *ex parte* applications of the respondent that the defendant be ejected from the whole of the said property, with costs, and that the mill be closed. This was done and the seals of the court put upon it.

On the 17th and 28th of June, 1878, the court refused applications by the appellant first for a rule nisi to set aside the said orders, on the ground that he was owner of one-fourth share of the mill and sole owner of two ovens attached to the mill; that C. had paid for and obtained possession of his three-fourths share; and that the respondent had ceased to have any interest in the said property. Second, for leave to appeal to Her Majesty in council against the order of the 17th of June.

Thereafter by a series of orders the court refused to set free the movable property so placed under seal at the mill, or to set free the said two ovens, refused to the appellant a rule nisi to that effect, and refused to *suspend the proceedings and [565] reopen the mill and ovens until security for damage be given, in the latter case directing the defendant, who was no party to the application, to pay the costs. A further order *ex parte* on the application of the respondent was made that exclusive possession of the mill, bakery, and ovens be given to C., and that the defendant remove certain movable property on filing an affidavit that the same belonged to her and her husband, and that he consented to such removal; in default whereof the court, in the first instance, ordered that the same should be sold, but subsequently discharged this order on the application of the respondent, and substituted for it an order that the respondent should be at liberty to remove the movable property not belonging to him, and the defendant pay the costs:

Held, that the appellant had unquestionably suffered grievous wrong by reason of

* *Present*:—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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these irregular proceedings made in a suit to which he was no party. The defendant could not be sued as trustee without joining her husband, and was not the representative of her husband *quoad* his beneficial interest in the property. The court could not compel a sale nor put a purchaser into possession of more than the three-fourths share (subject to the mortgage), which was vested in the respondent.

Having regard to the power of the Turkish authorities over the land, and to the fact that C. was not subject to the jurisdiction of the Consular Court, no order could be made directing restoration of possession or decreeing damages, but the orders appealed against were declared to have been irregularly and improperly made, and were set aside with costs.

[5 Appeal Cases, 588.]

H.L. (E.), June 1, 1880.

[HOUSE OF LORDS.]

588] *ANNE THEOPHILA CARMICHAEL, CATHERINE G. and JANE T. CARMICHAEL, *Appellants*; and ELIZABETH GEE (Widow), ZARA HARRIET GEE, and SAMUEL MAHOOD and Others, *Respondents* (¹).

Will—Annuity—Corpus of the Estate—Residue.

A testator appointed his wife and two other persons his trustees and executors—he empowered his trustees to make grants of his real estate in fee, or otherwise to sell his real and personal estate, and to stand possessed of the money arising therefrom in trust to invest the same, and set apart a sufficient portion of such investments as will produce the annuity of £1,200, “which I bequeath to my wife for her life,” payable on the usual quarter days, “the first payment to be made on the first of such days as shall happen after my decease, such annuity in case of my wife’s second marriage, to be reduced to the annual sum of £150,” and subject to such investment to set apart £5,000 for his daughter Z. “As to the entire residue of my trust estate, and as to that part set apart in favor of my wife, and as to such part thereof as shall be no longer required to be set apart in consequence of her second marriage” in trust for three grandchildren:

Held, affirming the decision of the Court of Appeal, that this was the bequest of an annuity, and of an annuity not so restricted as to make it payable exclusively out of the income of a particular fund arising during the widow’s lifetime. While the property remained unconverted (as might be the case during the whole of her life), the annuity was a charge on the whole income of the estate. The fund not being sufficient to produce the £1,200 a year, the deficiency was to be made good out of the corpus.

May v. Bennett (²) and *Wright v. Callender* (³) adopted.

APPEAL from an order of the Court of Appeal which had reversed a previous order of Vice-Chancellor Hall in an administration suit of *Gee v. Mahood* (⁴).

Robert Gee, by a will dated the 5th of November, 1868, appointed his then wife, Elizabeth Gee (now respondent), the Rev. W. P. Trevelyan, and Samuel Mahood, his executors and trustees, and he gave by his

(¹) Affirming 32 Eng. R., 870, reversing 25 Eng. R., 850.

(²) 1 Russ., 370.

(³) 2 De G. M. & G., 652.

(⁴) 9 Ch. D., 151; 25 Eng. R., 850.

will some specific and pecuniary legacies, and an annuity of £20 to one M. T. Dribble, for her life, payable quarterly. He then proceeded as follows: "I give, devise, appoint, and bequeath all other the real estate to which I shall be entitled at my decease—and I bequeath the residue of my personal estate to which I shall be entitled, to my said wife and W. P. T. and Samuel Mahood, and the survivor and survivors of them, their heirs, executors, &c., according to the nature and quality thereof respectively: Upon trust that my said wife and W. P. T. and S. M., their heirs, executors, &c., do and shall from time to time, and at all times hereafter, receive and take the rents, &c., upon the trusts hereinafter declared." The first trust was to grant building leases not exceeding 1000 years "of all or any part of my said real estate," and, when they should think fit, "to sell and dispose of all my real and personal estate," or parts thereof, as therein mentioned. And they were to stand possessed "of the moneys arising from the sales," in trust to invest in the stocks of Great Britain or India, or on mortgages of copyhold or freehold estates, "with liberty for the trustees with the consent in writing of my said wife during her life," to vary the investments. "And upon farther trust to set apart a sufficient portion of such investments as will produce the annuity of £1,200 a year, which I bequeath to my said wife for her life, payable quarterly on" the usual quarter days, "the first payment to be made and become due on the first of such days as shall happen after my decease, such annuity, in case of my said wife's second marriage, to be reduced to the annual sum of £150 [which was to be paid as the other would have been]. . . . And, subject to such investment in favor of my said wife, in trust to set apart £5,000 other part thereof for my dear daughter Zara on her attainment to the age of twenty-one years, or marriage, which shall first happen, to be settled on her and her children as the trustees shall, by deed, declare. And as to the entire residue of my said trust estate, and as to that part thereof set apart in favor of my said wife, after her death, and as to such part thereof as shall be no longer required to be set aside, in consequence of her second marriage, in trust as to one moiety for all and every the three children of my late dear daughter Jane Theophila Carmichael, in equal shares." *The other moiety was to go to Zara. If the chil- [590] dren of Theophila should die before a vested interest was acquired, the whole was to go to his daughter Zara. And no sale was to be made during the life of his wife, without her previous consent in writing; but the unsold real estate and

the outstanding personal estate were to be subject to the trusts thereinbefore contained concerning the moneys and funds, and the rents and produce thereof were "to be deemed annual income for the purposes of such trusts," and the real estate was to be transmissible as personal estate under the ultimate trusts thereinbefore contained.

The testator died on the 6th of July, 1869, and the will was proved by the widow and Samuel Mahood. No change had been made in the investments. The widow had created certain incumbrances on her interest. The estate of the testator proved to be insufficient to meet the widow's annuity. No part of the estate, or of his investments in stocks, &c., had been set aside for that purpose. An administration suit was instituted (*Gee v. Mahood*), and in that suit Elizabeth Gee, the widow, presented on the 1st of July, 1876, a petition asking, among other things, to have the arrears of the annuity raised out of the corpus of the estate. The cause came on, for hearing and farther consideration, before Vice-Chancellor Hall, who declared that Elizabeth Gee was not entitled to have recourse to the corpus of the estate, nor to the income of subsequent years, to provide for the deficiency in former years of her annuity of £1,200⁽¹⁾. On appeal this order was varied, and it was declared that Elizabeth Gee was entitled to have recourse to the corpus of the estate, and to the income of subsequent years, to supply the deficiency of former years⁽²⁾. The incumbrancers on the widow's interest in the estate were, as such, parties to the suit, and had joined in the appeal against the Vice-Chancellor's order, and were now respondents with the widow to maintain the decision of the Court of Appeal. The three children of Theophila appealed against the decision of that court.

Mr. *W. Pearson*, Q.C., and Mr. *Vaughan Hawkins*, for the appellants: The will here has been misconstrued in the 591] Court of Appeal, *and a benefit has been conferred on the widow which was never intended by the testator to be given to her. He believed that the income of his property would be sufficient to satisfy her annuity, and he gave her that income, but he never meant that she should come upon the corpus of the estate, and so absolutely take away all provision for the children of his daughter Theophila. The gift of £1,200 a year was not an indefeasible gift of an annuity of that amount. It might, on a second marriage, be cut down to £150, and it was directed to come out of investments which, of course, might from time to time vary in

⁽¹⁾ 9 Ch. D., 151; 25 Eng. R., 850.

⁽²⁾ 11 Ch. D., 891; 32 Eng. R., 870.

productiveness. The testator believed that those investments would be sufficient to satisfy the annuity to the wife, and to provide a sum of money for his daughter Zara, and therefore could not have meant that that provision for Zara should be liable to be wholly defeated, by the corpus of the estate being rendered liable to make good the deficiencies of the investments. There was not an expression in the will which showed that the investments themselves were to be applied in that way, and the general purport of the will was opposed to such a supposition. The testator had made all his dispositions on the assumption that the income from the investments would be sufficient to provide for the annuity, and it was not because it turned out that he was mistaken as to the value of his property, that the general scheme of his will was to be defeated, and his surviving daughter and the children of his other daughter were to be left unprovided for, in order to satisfy the wife's life interest alone. The intention of the testator was plain and was plainly expressed, and being so, ought to decide the case. The authorities too were clear upon the subject. In *Baker v. Baker* (¹), in a will almost exactly like this, it was held that the widow was not entitled to have the deficiency of the annual income made good out of the corpus. And the question put by the Lord Chancellor there applied exactly to this case, namely, how would the corpus have been affected by every deficiency if the money had, as might have been the case, been lent out on mortgage? *Wright v. Callender* (²), in which a different result was arrived at, was distinguishable from the present in the form of the trust, which was a specific direction to pay the weekly amount to the son out of the *general estate. Besides which it was to be remem- [592 bered that *Wright v. Callender* (²) was decided before *Baker v. Baker* (¹), where *Wright v. Callender* (²) was noticed, and was expressly distinguished from the case then under consideration. It was a gift of income to be paid at all events. *Tarbottom v. Earle* (³) favors the construction now contended for.

Birch v. Sherratt (⁴) was a case where the residue was to be subject to the payment of the annuity, and "from and after the payment of the annual sum of £100, and subject thereto," the trustees were to stand possessed of the investments for other purposes, which made the payment of the annual sum the primary object of the will; here there was nothing of the kind.

(¹) 6 H. L. C., 616.

(²) 2 De G., M. & G., 652.

(³) 11 W. R., 680.

(⁴) Law Rep., 2 Ch., 644.

In a case like this, where there was a general deficiency, the principle was that there should be a general abatement, *Page v. Leapingwell* (¹); not that specific legatees should alone be sacrificed in order to make good a particular life interest. As in *Baker v. Baker* (²) it was "apparent from the language of the will that the testator intended that the fund should be continued in its integrity during the life of the annuitant, and in that state should go over." The real question is whether what is given is given as an annuity to be paid at all events out of the general estate, or is the interest of a particular fund devoted to that special purpose? It is submitted that in this case the interest of a particular fund is all that the testator intended to give. In *Miller v. Huddleston* (³), the annuities were held not to be payable out of the corpus, but, there being a deficiency, all the interests were held to be affected ratably.

Foster v. Smith (⁴) carried out the principles now contended for. There the devise was of real estate in trust to receive the rent, &c., and thereout to pay to the testator's widow an annuity, and from and after her death to convey the estates to the testator's three sisters. The Vice-Chancellor had held that a deficiency might be made good out of the corpus, but the Lord Chancellor Lyndhurst, reversing 593] that decision, held that the annuity was a *charge only on the rents which had accrued during the life of the widow. There was nothing in this will which made the annuity payable at all events, so as to defeat the gifts intended by the testator for the benefit of his children.

Mr. *Graham Hastings*, Q.C., and Mr. *Warmington*, appeared for the widow, and Mr. *Farwell*, for the incumbancers, but were not called on to address the House.

THE LORD CHANCELLOR (Lord Selborne): My Lords, this case has been very ably argued, but your Lordships, I believe, do not think it necessary to hear the counsel in support of the judgment appealed from. Your Lordships, I believe, are all agreed in thinking that that judgment is right.

The question may be stated very nearly in the terms used by Lord Gifford in the case of *May v. Bennett* (⁵). It is, "whether the bequest in favor of the widow is to be considered as a bequest of an annuity, or as a bequest of the income" (I interpolate the words 'or part of the income') "of a sum of money, which is directed to be set apart." It

(¹) 18 Ves., 463.

(²) 6 H. L. C., 616.

(³) 1 Ph., 629; 15 L. J. (Ch.), 183.

(⁴) 8 Macn. & G., 513; 21 L. J.

(Ch.), 1.

(⁵) 1 Russ., 370.

appears to me to be reasonably clear, upon the will, that it is the bequest of an annuity, and of an annuity not so restricted or limited as to make it payable exclusively out of the income of a particular fund arising during the widow's lifetime.

I do not think that the early part of the will, which precedes the trust, is of any importance in the case. In that portion of the will the testator, as he has himself said, appears to have been fulfilling what he considered a moral obligation, to dispose, probably in a way agreed upon between himself and his wife, of the fortune which he had received, in right of his wife, since their marriage. He treats that part of the will as equivalent to the restoration of her fortune. It appears to me that we may set that entirely aside; and, so doing, we come to the trust of his whole estate, after that part which he received from his wife has been so taken out and disposed of.

The particular order in which he declares his will, concerning that trust estate is not, I think, to be regarded as affording any *clue to the effect of the will upon the point [594 now in controversy. The testator was constituting a general trust of all his real and personal estate; and nothing was more natural, than that clauses of administration and management should immediately follow the constitution of that trust.

Towards the end of those clauses, which I have called clauses of administration and management, occurs the direction to invest and set apart out of the estate, when converted, a sufficient sum for the purpose of paying the annuity now in question. But, my Lords, although it is in this way that the annuity is first mentioned, it appears to me to be reasonably clear that you can disengage from that context a clear gift of an annuity; which annuity was not, in the mind of the testator, and in truth could not have been, dependent upon the fulfilment of the course of administration up to that point, as a condition precedent to the vesting of the annuity itself.

The words in which the testator first mentions the annuity are these (I do not read those about the investment): "The annuity of £1,200 a year which" (that is, "which annuity") "I bequeath to my said wife for her life, payable quarterly on every 25th day of March, 24th day of June, 29th day of September, and 25th day of December; the first payment to be made and become due on the first of such days as shall happen after my decease." Then he provides, that such annuity is to be reduced in the case of his wife's second

marriage to the annual sum of £150 instead of £1,200; and he directs how that reduced annuity is to be paid.

In my opinion, the true effect of that portion of the will is precisely, and to all intents and purposes, the same as if he had said, disengaged from anything as to investment: "I bequeath to my wife an annuity of £1,200 a year;" followed by the other directions, which I have read to your Lordships.

The fact that this annuity was to be paid quarterly, and that the first quarterly payment was to be made and become due on the first of the days mentioned which should happen after the testator's decease, proves conclusively that the gift of the annuity, and the vesting of the title of the widow, were, in his mind, independent of the execution of those preliminary trusts in the course of administration, of which 595] the final result was to be an investment *for the purpose of that annuity. Looking farther into the will, we see that he also contemplated, and made provision to the effect, that the sale of the real estate, and the getting in of the personalty, which must necessarily precede any such particular investment for the purpose of the annuity, might be delayed, if the widow chose, during the whole of her life. She was one of the trustees; and, therefore, the power to delay the conversion of the personal estate into money was vested in her jointly with her co-trustee; and, as to the real estate, the power was given to her absolutely. In that state of things, while the property remained unconverted, I apprehend it to be clear that the annuity was an absolute charge upon the whole estate, and of course upon the whole income of that estate.

I agree with what was said by Mr. Vaughan Hawkins, that equity considers that done which ought to be done; and, therefore, that this clause, authorizing the postponement of the conversion, would not be allowed to defeat any rights, which ought to have accrued if the conversion had taken place immediately. That is quite true; but, on the other hand, it would be difficult to reconcile with the intention thus appearing any construction of the earlier part of the will, which would represent the annuity as a mere life interest in the whole or part of a separated fund.

So far, there would be no doubt; and I beg your Lordships to observe, with regard to the argument founded upon the context, that if there had been no conversion in the lifetime of the widow, and no particular investment, there would have been no particular fund to go over to the residuary legatees, and the residuary legatees would simply have taken the whole estate, charged in its entirety during

the widow's life with this annuity, and they would have taken it all as residuary legatees after her death.

It is said, that part of the general estate, which is ordered to be thus invested for the purpose of securing the annuity, is made, after the completion of that investment, a specific fund, of which she is thenceforth to be tenant for life, at all events to the extent of £1,200 a year, payable out of the income of that fund, and that the *corpus* of the same fund is given over afterwards to the persons who are the residuary legatees. My Lords, that construction appears to me to have been truly described by Lord Justice James *as [596 "sticking in the bark." I apprehend it to be clear, that the separation from the residue of this particular sum, as one which would come in after the death of the wife or after her re-marriage, was formal only, and not substantial. It is given *uno flatu* with the residue, to the same persons, and in the same manner. The testator, no doubt, anticipated that it would not come in with the free residue, or at the same time; and therefore he mentioned it as something additional—using a form of expression which distinguished it from that which was residue in the sense of immediate surplus, after making (among other things) proper provision for the payment of the annuity.

But, though thus distinguished as a separated and postponed part of the residue, the whole context shows that those who are ultimately to take it are to take as residuary legatees.

I find, therefore, nothing here, except a testator giving an annuity to his wife; desiring her to enter into the immediate enjoyment of it, contemplating that during the whole of her life it may be a charge upon his general estate; but at the same time providing that, if the estate is converted into money, there shall be a sufficient investment to secure this annuity, so as to release the rest of the estate, and to enable that to be paid over immediately to the residuary legatees.

I will not trouble your Lordships with any observations upon authorities, except to say that this case seems to me to fall within the principles of *May v. Bennett*⁽¹⁾ and *Wright v. Callender*⁽²⁾, and to be quite different from *Baker v. Baker*⁽³⁾. With regard to the last case cited by Mr. Vaughan Hawkins, *Miller v. Huddleston*⁽⁴⁾, that appears to me to have depended upon the special language of a very special will; and, assuming it to have been rightly decided, I find in it nothing applicable to the present case.

(1) 1 Russ., 870.

(2) 2 De G., M. & G., 652.
33 ENG. REP.

(3) 6 H. L. C., 616.

(4) 3 Macn. & G., 514; 21 L. J. (Ch.), 1
52

I therefore propose to your Lordships to dismiss the present appeal with costs, giving only one set of costs to the respondents.

LORD HATHERLEY: My Lords, I am of the same opinion; and the point is really so short, and has been so clearly pre-597] sented in the address which *you have heard from my noble and learned friend on the woolsack, that it would be unbecoming in me to occupy any farther time in this discussion. I would simply say it appears to me clear that if you take into your view the two different classes of cases, the one *Baker v. Baker* ('), and the other *Wright v. Callender* ('), which have been discussed before us this morning, in the one class there is a general trust fund which is partitioned between two parties, the one taking a life interest and the other taking an interest in remainder. That is the case of *Baker v. Baker* ('), and there, of course, the person entitled to the life interest in that fund only, has not any right to do more than receive the income accruing from that fund. But, on the other hand, if you find it to be the gift of an annuity, in which I concur entirely with my noble and learned friend, and, for the same reasons, if I say you find it the gift of an annuity, in this case made to the wife, of £1,200 a year, and if you find that that is the character of the gift, those who take subject to that gift, and those who take another portion of the residue of the estate (that gift having been previously directed to be taken out of it), must submit to any loss or inconvenience which may be occasioned by the fact that the estate of the testator has fallen short of what he, and everybody else, had expected would be the condition of the residue. But that will not convert this gift, which was a gift out and out, into a gift which was a life-tenancy only in a portion of the residuary estate, which is the argument that has been presented to us on the present occasion.

Therefore, when one comes to look carefully at the wording of this will, it really seems to me a sufficiently clear one, and that it does not require much exposition or discussion on the part of your Lordships.

LORD BLACKBURN: My Lords, I am of the same opinion. I take it that the whole question turns upon the construction of the will. I do not think there is anything illegal or improper, or that could not in any way be enforced in a bequest by which an annuity was left, which was made pay-598] able entirely and exclusively out of the *income of any particular fund. Of course that might be done, but

(') 6 H. L. C., 616.

(*) 2 De G., M. & G., 652.

that, I think, is not done here; and upon that point, and upon the construction of the will, I so thoroughly agree with what has been said by the noble and learned Lord on the woolsack, that I do not think it necessary to add anything farther.

LORD WATSON: My Lords, I have no hesitation whatever in agreeing with the views which have been expressed by your Lordships and by the Judges of the Court of Appeal below. I think, according to the true construction of its terms, this will imports a direct bequest of an annuity of £1,200 to the testator's widow, followed by a direction, for the purpose of administration, to his trustees, to set apart a sum sufficient to yield an income that would make up that amount, before paying away any part of the residue. I cannot find any words indicative of an intention on the part of the testator to limit the fund out of which it was to be paid, to the income of the sum so set apart, or even, as has been contended in another way by the counsel for the appellant, out of the income of the estate. I cannot read the terms of what I venture to call the clause disposing of the residue in this case, as a gift to the residuary legatee, not in the nature of a residuary gift, but importing the specific bequest of a sum after that set apart to meet the wife's annuity, accompanied by an expression of his intention that that sum should pass intact to the legatee. I therefore entirely concur with the views already expressed by your Lordships.

Order appealed from affirmed, and appeal dismissed with costs; one set of costs only being allowed to the respondents.

Lords' Journals, 1st June, 1880.

Solicitors for appellant: *Hicks & Son.*

Solicitors for respondents: *Longcroft & Myers; Stokes, Saunders & Stokes.*

See 32 Eng. R., 878 note.

A share of stock represents the interest of the shareholder in the capital and net earnings of the corporation. When he transfers the stock before a dividend has been declared, he transfers his entire interest and dividends subsequently declared; without reference to the source from which the funds are acquired by the corporation, it belongs to the holder of the stock at the time of the declaration.

Certain guaranteed stock of a railroad corporation was issued in 1857.

This stock was entitled to semi-annual dividends out of the earnings, but no dividends were paid until 1863. Some of the stock was assigned to plaintiff in 1870. Held, that the plaintiff as assignee of the stock was entitled to the undeclared dividends; that the fact that the corporation had sufficient net earnings in 1864 to make the dividends, did not vest them in those who then held the stock: *Jermain v. L. S.*, etc., 16 N. Y. Weekly Dig., 465, 91 N. Y., 483, affirming 14 Weekly Dig., 166, 26 Hun, 474 mem.

1880

Postlethwaite v. Freeland.

H.L. (E.)

A testator gave and bequeathed to his executors bonds and stocks amounting at their par value to the sum of \$150,000, to be distributed and applied to such charitable and educational uses, and in such manner as should be specified and directed in a codicil to his will, which he was not then prepared to make. In case no such codicil was made, then, upon the trust, to distribute the said sum to and among such incorporated societies, organized under the laws of the State of New York or the State of Maryland, having lawful authority to receive and hold funds upon permanent trusts for charitable or educational uses, as his executors, the survivors or survivor of them should select, and in such several sums as they should determine. The distri-

bution was to be made and completed in the lifetime of the longest liver of two persons named in the will, and, at any rate, before the expiration of three years from the testator's decease. The testator died without having made the codicil referred to in the will, and thereafter stocks and bonds of the par value of \$150,000 were transferred to the executors.

Held, that the direction authorizing them to distribute the fund among such of the corporations named as they should select, was valid.

That all interest received upon the stocks and bonds, after the expiration of one year from the death of the testator, should be included in and distributed with them: *Prichard v. Thompson*, 29 Hun, 295.

[5 Appeal Cases, 599.]

H.L. (E.), May 7, 10, 11; June 7, 1880.

[HOUSE OF LORDS.]

599] *WILLIAM POSTLETHWAITE, *Appellant*; and JOHN FREELAND and ALEXANDER FREELAND, *Respondents* (').

Charterer—Discharging Cargo, Means for.

The duty of providing, and making proper use of, sufficient means for the discharge of a cargo, when a ship, which has been chartered, arrives at its destination, and is ready to discharge, lies upon the charterer. But that general duty may be qualified by words in the charterparty, and by the circumstances of the case. If, by the terms of the charterparty, the charterer has agreed to discharge the ship within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it. If there is no fixed time, the law implies an agreement, on his part, to discharge the cargo within a reasonable time.

Per LORD HATHERLEY: When the covenant merely engages that the merchant shall with all dispatch, according to the custom of the port, unload the vessel, he will fulfil his contract if he employs all the usual methods of dispatch at the port.

A charterparty was entered into by which a vessel was to take on board a cargo of steel rails and fastenings, and proceed therewith to the port of East London, in South Africa. In the charterparty was this stipulation: "The cargo is to be discharged with all dispatch according to the custom of the port." The discharge of such a cargo could only be effected there by a warp and lighters. These were under the absolute control of a company, to which the governmental authorities had transferred all their powers. The company allowed vessels the use of the warp and lighters in turn, making no exception in favor of any vessel except mail steamers, which on arriving were provided for to the exclusion of other vessels, whether of the government or of private individuals. The ship arrived at the port, found a great number of vessels there, the number of lighters was insufficient, and the ship could not obtain its "turn" until more than thirty-one working days had elapsed after its

(') Affirming 31 Eng. R., 426.

arrival. There was no delay attributable to the master or crew except what was thus occasioned by the custom of the port:

Held, that in this case the shipowner was not entitled to maintain an action against the charterer for demurrage.

THE plaintiff (the now appellant) was managing owner of the ship *Cumberland Lassie*. The defendants were merchants who entered by charterparty into a contract with him by which the ship was to proceed to Barrow-in-Furness, and there load a cargo of *370 tons of steel rails and [600 fastenings, with which it was to proceed to East London, Cape of Good Hope, "to discharge at any safe wharf, where ships can always lie safely afloat . . . the cargo to be brought to, and taken from alongside, at merchants' risk and expense." The lying-days for loading were provided for, and demurrage for delay beyond those lying-days was to be £5 per day. On arrival at the port of discharge the stipulation was, "The cargo is to be discharged with all dispatch, according to the custom of the port." The ship arrived off East London on the 31st of August, 1875. East London is a bar harbor, and a vessel of the burden of the *Cumberland Lassie* could not cross the bar until a considerable part of its cargo was discharged. The ship brought up at the usual place of discharge, about a mile outside the bar, on the 1st of September, 1875, being quite ready to discharge cargo as soon as the means and the custom of the port permitted. When ships arrived at East London, and required to discharge cargo, the course was this: The colonial government authorities had formerly exercised complete control over the discharge of cargoes from vessels arriving there. Those vessels lay outside the harbor, and were discharged by means of lighters which, by manual labor, were worked upon a warp and wire. The colonial government had, some time since, transferred all its interest and authority in discharging the cargoes of vessels arriving at the port, to a company called the "East London Landing and Shipping Company." All vessels arriving at the port lay outside the harbor till they could use the warp and the lighters employed by the company. Those lighters were worked by manual labor upon a warp, which was itself inside the harbor, but was connected with buoys outside the harbor. The company had only four lighters fit to carry rails, and these and all the other means for discharging cargo were under the absolute control of the East London Company. By the regulations of that company each ship arriving at the port was to be discharged in turn, except mail steamers, in favor of which all other vessels were to give

way; but as to all other vessels, even if they were government vessels, no interference on the part of the government was allowed. When the *Cumberland Lassie* arrived off the port of East London there were many other vessels (several 601] with similar *cargoes) already in the port, and entitled by the existing regulations to precedence in the use of the warp and the lighters. The consequence was that the *Cumberland Lassie*, though the master was fully prepared to discharge his cargo, and was anxious to do so, lay idle off the bar from the 31st of August to the 6th of October. On the 6th of October he was allowed to take his turn, and there was no complaint as to delay from that day until the discharge of the cargo. The action was brought to recover the sum of £215 for demurrage in respect of the delay between the 31st of August and the 6th of October. The stipulation in the charterparty, it was contended for the plaintiff, made the defendants liable for the delay in discharging the cargo, while for the defendants it was insisted that, under the circumstances which existed here, the provision for discharging "according to the custom of the port," exempted the defendants from any liability for a delay which that custom itself had occasioned. The cause was tried before Lord Coleridge and a special jury, on the 12th of March, 1878, when his Lordship put the following questions to the jury: 1. Was there any settled practice or custom between the months of April and November, 1875, as to the unloading of sailing vessels, laden as the *Cumberland Lassie* was laden, in the port of East London? 2. If there was, was the *Cumberland Lassie* unloaded with all dispatch according to that custom? 3. If there was no settled practice, was the *Cumberland Lassie* unloaded with all dispatch under the circumstances? The jury found the first two questions in the affirmative, the third, therefore, became immaterial. The verdict, on these findings, was ordered to be entered for the defendants. A rule for a new trial was obtained, and, after argument, discharged. The case was taken to the Court of Appeal, and was heard by Lords Justices Brett, Cotton, and Thesiger, when Lords Justices Brett and Thesiger were of opinion that the appeal should be dismissed. Lord Justice Cotton dissented ('). The appeal was then brought.

Mr. Butt, Q.C., and *Mr. Cohen*, Q.C. (*Mr. Bigham* was with them), for the appellant: It is the clear duty of the 602] charterer of a vessel to take all *proper means to discharge the cargo, and if he fails to do so he becomes liable for the delay thus occasioned. That principle was laid

(') 4 Ex. Div., 155; 31 Eng. R., 425.

down in express terms by Lord Ellenborough in *Randall v. Lynch* (*). In that case forty days were allowed by the charterparty for unloading, but the time taken was thirty-one days beyond that period, and the delay was attributed to the crowded state of the London Docks at that time. Lord Ellenborough said, "The question is whether the detention of the ship, arising from the inability of the London Dock Company to discharge her, is, in point of law, imputable to the freighter; I am of opinion that the person who hires a vessel, detains her, if, at the end of the stipulated time, he does not restore her to the owner. He is responsible for all the various vicissitudes which may prevent him from doing so." His Lordship treated the dock company as the freighter's agents for the delivery of the cargo, and declared that the freighter was "as much responsible for a delay arising from the want of a berth, as if it had arisen from tempestuous weather or any other cause." In that case, therefore, the rule was expressed which was in all respects applicable here. The crowded state of the docks, and even the happening of tempestuous weather, were declared not to exempt the freighter from his general liability to procure the speedy discharge of the vessel. In *Ford v. Cotesworth* (*) that principle was adopted, and Mr. Justice Blackburn said (*): "We agree that whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances. And if some unforeseen cause, over which he has no control, prevents him from performing what he has undertaken within that time, he is responsible for the damage." That principle had been adopted in *Wright v. The New Zealand Shipping Company* (*), so that circumstances not within the control of the freighter were held not to excuse him. The principle was, that the duty to discharge *depended on him, and if [603 he did not make special covenants as to any interference with the performance of that duty, he must be held liable. The distinction which was taken in the present case by the Lord Chief Baron (*) that "Lord Ellenborough was speaking there of the duties of charterers under a charterparty which limited the time for discharging, not in respect of a

(*) 2 Camp., 352, 355. See 12 East, (2) Law Rep., 4 Q. B., 127; affirmed, 5 178. See also *Rodgers v. Forresters*, 2 Q. B., 545.

Camp., 483, and *Burnester v. Hodgson*, 2 (2) Law Rep., 4 Q. B., at p. 133.

Camp., 488. (4) 4 Ex. Div., 165 n.; 31 Eng. R., 486.

(5) Printed Appendix, p. 123.

charterparty containing such words as occur here, which are, that the vessel is to be discharged 'with all dispatch according to the custom of the port'" could not be sustained. [LORD BLACKBURN: If he accepted the lighters sent and they were not sufficient, would that render the freighter liable?] It would; it was his duty to provide sufficient means for discharging the cargo, and he must be taken to know the customs and mode of business of the port, and to be prepared accordingly. In *Ashcroft v. The Crow Orchard Colliery Company* (¹) the defendants, who had undertaken "to load with the usual dispatch of the port," or to pay 40s. a day demurrage, were held liable, though there were regulations at the loading dock prohibiting any persons from having more than three vessels loading at the crane at any one time, and so interfered with the progress of the work. In that case *Tapscott v. Balfour* (²) had been relied on as showing that the lay-days commenced only from the time when the ship was admitted into the dock, which would have had the effect of relieving the charterer, but the Court of Queen's Bench did not adopt that construction of the charterparty, but described the stipulation "as a contract by the charterer that he will load with the usual dispatch, and it is no answer to say that he was unable to do so." In *Adams v. The Royal Mail Steam Packet Company* (³) the charterer agreed to load a vessel, on arriving at Cardiff, with a cargo of coals, in the customary manner; the loading did not take place as agreed, and in an action for demurrage the delay was held not to be excused by a strike among the colliers and a dispute with a railway company along whose lines the coals were to be brought, for that these matters, though beyond the control of the charterer, had not been contemplated by either party when the [604] charterparty was made, *and therefore the general rule that the loading must take place within a reasonable time was adhered to. Here, the merchant was bound to have sufficient lighters ready at all events. *Cunningham v. Dunn* (⁴) did not at all affect the general rule of the duty of the charterer, for there both parties knew of the Spanish Government's regulation would prevent the shipment of the cargo, and an application had been made to the government to relax it, which application was refused, and therefore it was the common fault of both that the ship was dispatched to make the attempt. [LORD BLACKBURN referred to *Moir*

(¹) Law Rep., 9 Q. B., 540; 10 Eng. R., 167.

(²) Law Rep., 8 C. P., 46; 4 Eng. R., 816.

(³) 5 C. B. (N.S.), 492; 28 L. J. (C.P.), 33.

(⁴) 3 C. P. D., 443; 30 Eng. R., 239.

v. *The Royal Exchange Assurance Company* (').] In *Davies v. McVeagh* (') Lord Justice Bramwell states the principle to be deduced from all the cases in these terms: "When a ship is to take on board cargo at a specified place of loading, the responsibility rests, not with her owner, but with the charterer, if the specified berth is not in a fit state to receive her upon her arrival at the appointed time." Of course the same principle applies to unloading as well as to loading a vessel. *Erichsen v. Barkworth* (') was also referred to. In *Thijs v. Byers* (') the principles now contended for were adopted and acted upon. Even where the charter-party allowed a given number of days to the charterer, it was held that in such a case the law implied a contract, on his part, that from the time when the ship was at the usual place of discharge, he would take the risk of any ordinary vicissitudes which might occur to prevent his releasing the ship at the expiration of the lay-days. And *Nelson v. Dahl* (') laid down the rule that when the shipowner had brought the ship as near to the place of discharge as it could safely get, damages for the delay which afterwards occurred in not getting it a berth must fall on the charterer. The principle to be applied to this case was clear, and there was nothing to exempt the charterer from its operation.

Mr. *Watkin Williams*, Q.C., and Mr. *J. W. McLeod*, for the respondents: It is not necessary to dispute the general propositions contended *for on the other side. [605 Where nothing is expressed of course there may be different things implied, but where the contract distinctly entered into between the parties does express precisely what is to be done, no mere implications can affect that contract. It is true that in this case there is a stipulation that the "cargo is to be discharged with all dispatch," but those words are immediately qualified by the added words, "according to the custom of the port." The charterer in terms undertook the duty which the numerous cases referred to were said, by implication, to cast on him, and he qualified the assumption of that duty by words which freed him from its strict observance, if circumstances beyond his control, namely, the custom of the port, rendered him incapable of discharging it. Both parties knew the meaning of these words and agreed to them. And the facts of the case show that everything which it was in the power of the charterer to do was done, and that in no way whatever did the fault

(1) 3 M. & S., 461.

(2) 3 H. & N., 601, 894.

(3) 4 Ex. D., 265; 31 Eng. R., 493.

(4) 1 Q. B. D., 244; 16 Eng. R., 308.

(5) 12 Ch. D., 568.

of the delay rest with him. Nor was the delay caused by anything over which he could possibly exercise any control. Under the very words of the contract, therefore, he is free from all responsibility. The charterer was within the principle laid down in *Taylor v. Great Northern Railway Company* ⁽¹⁾ where the defendant company, which had been prevented, by a stoppage of the line occasioned by the act of another company having running powers over the line, from delivering the plaintiff's goods within a reasonable time, was held to be exempted from responsibility. *Thiss v. Byers* ⁽²⁾ was not unfavorable to the respondents, for the cause of the delay there was the ordinary occurrence of bad weather, the risk of which might well be supposed to be undertaken by the charterer. But here was an obstacle to unloading, arising from a custom of the port quite beyond the power of the charterer to prevent or to remedy, which must be taken to have been known to both parties, and as to which by the very terms of the contract he was agreed to be freed from all responsibility.

Mr. Cohen, in reply.

606] *THE LORD CHANCELLOR (Lord Selborne): My Lords, the question in this case is, whether demurrage is payable for delay in discharging a cargo of steel rails at the port of East London in South Africa, under the following circumstances:

By the charterparty, the appellant's ship *Cumberland Lassie* was to take on board at Barrow-in-Furness, and to deliver at East London, "at any safe wharf where ships can always lie safely afloat, as ordered on arrival, or so near thereto as he" (i.e. the master) "can safely get," the cargo in question, which was "to be brought to and taken from alongside at merchants' risk and expense," and "to be discharged with all dispatch according to the custom of the port." For the loading at Barrow a fixed number of days was agreed upon, with demurrage at a fixed rate if that time was exceeded.

East London is a port with a bar at its entrance, over which ships heavily laden (as this ship was) cannot pass till they are lightened by the discharge of great part of their cargo. This is done by means of lighters propelled by manual labor along a main rope or warp, running from a quay inside the harbor, across the bar, to a buoy outside, from which they are hauled to the ship's side by means of branch warps. The main warp, and the whole supply of lighters at the port, were in the hands and under the management

⁽¹⁾ Law Rep., 1 C. P., 385.

⁽²⁾ 1 Q. B. D., 244; 16 Eng. R., 308.

of the colonial government till 1873, when they were transferred by the government to a company called the East London Landing and Shipping Company. It is stated in the appellant's case that "prior to 1873 the warp had been the property of the colonial government, but in that year it was taken over by the company." Mr. Jameson, a director of the company, gave evidence to the effect that in 1875, and for some time afterwards, they had a control over the use of the warp; and this is consistent with other parts of the evidence, particularly where it is stated in the Appendix that, when the company had once begun the discharge of a vessel they "would not allow" any interference, even by the government surf-boats; and that "when the government" (which seems to have reserved to itself some sort of concurrent right with the company) "had commenced the discharge of a ship they acted in the same way." The company in 1875 had nine lighters, of which only seven were in *working order, and only four were fit to discharge [607 such a cargo as that of the Cumberland Lassie, at the time when that ship arrived. The government had usually two, and appears to have brought in three more about that time, or soon afterwards, from Port Elizabeth in Algoa Bay, more than 150 miles off, which was the nearest port where any additional lighters could have been obtained. The rails on board the Cumberland Lassie were shipped on account of the Crown agents in the colony; but I do not find in the evidence any proof that, consistently with the usage of the port (as already described), any of the government lighters were, or could have been made, available for the discharge of this particular cargo, by any arrangements within the charterers' power. When (as happened on the arrival of this ship, and as seems to have usually happened at the same time of the year) there were more ships lying off the bar than the lighters in the port could simultaneously discharge, every ship was discharged in turn according to the order of its arrival, as reported at the port office; one lighter per diem being sent to it on every working day, till the ship could cross the bar. If no lighter was ready, suitable for the particular cargo, the ship might lose its turn for the day; which, however, did not happen in this particular case.

There were twenty-four working days during which the Cumberland Lassie lay idle off the bar at East London, from the 31st of August to the 6th of October, 1875, ready (as far as the master was concerned) to discharge the cargo, but prevented from doing so by the priority in the use of the warp, and of the lighters then available at the port, allowed

by the custom of the port to ships which had previously arrived there. This ship's turn came on the 6th of October; and no complaint is made of any subsequent delay. The question before your Lordships is, whether demurrage is payable for detention there during those twenty-four working days? At the trial before Lord Coleridge, a verdict was given for the defendants, the charterers, under the direction of that learned judge. A rule *nisi* was obtained for a new trial; but this, after argument, was discharged by the Lord Chief Baron and Mr. Justice Hawkins, sitting as a divisional court. Their judgment was affirmed by a majority (Lords Justices Brett and Thesiger) in the Court of Appeal; Lord Justice Cotton dissenting. The appeal 608] *to your Lordships is from that decision, and my opinion is that the judgment appealed from ought to be affirmed.

There is no doubt that the duty of providing, and making proper use of, sufficient means for the discharge of cargo, when a ship which has been chartered arrives at its destination and is ready to discharge, lies (generally) upon the charterer. If, by the terms of the charterparty, he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to be detained in his service beyond the time stipulated. If, on the other hand, there is no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time; that is, as was said by Mr. Justice Blackburn, in *Ford v. Cotesworth* (*), "a reasonable time under the circumstances." Difficult questions may sometimes arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If (as in the present case) an obligation, indefinite as to time, is qualified or partially defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice, which the charterer could not have overcome by the use of any reasonable diligence, ought (I think) to be taken into consideration.

These distinctions are well illustrated by three cases in Campbell's Reports, which were referred to in the arguments at your Lordships' bar. In *Randall v. Lynch* (*), the charterer was held liable for demurrage, a particular time being fixed by the charterparty for the discharge of the cargo. In

(*) Law Rep., 4 Q. B., 127; 5 Q. B., 544.

(*) 2 Camp., 352; 12 East, 179.

Rodgers v. Forresters (¹) (where the contract was to discharge the ship "within the usual and customary time for unloading such a cargo"), and in *Burmester v. Hodgson* (²) (where the court thought this to be the contract which the law ought to imply from the terms of the charterparty), the charterer was held not liable for demurrage. In all those three cases the circumstances which caused the detention of *the ships were the same, viz., the crowded state of [609 the London Docks, in which the ships were, by act of Parliament, obliged to unload.

If your Lordships should agree that the present appeal ought to be dismissed, you will, I think, be adhering to the principle of *Rodgers v. Forresters* (¹) and *Burmester v. Hodgson* (²), which does not appear to me to be inconsistent with that of the later authorities. Two recent cases were much relied upon in the argument of the appellant's counsel at your Lordships' bar: *Ford v. Cotesworth* (³) and *Wright v. The New Zealand Shipping Company* (⁴). That of *Ford v. Cotesworth* (³) is, I think, perfectly consistent with the earlier cases. The judgment of the Court of Error turned upon a *vis major*, which the court held to have impeded the master of the ship, as well as the agent of the charterer, from performing his part in the discharge of the vessel. But at the trial the jury was told by the Lord Chief Justice of England (in my opinion correctly, nor do I perceive that the Court of Error thought otherwise) that "the question whether the time was reasonable or unreasonable ought to be judged with reference to the means and facilities available at the port, and to the facilities and course of business at the port." In the other case (*Wright v. The New Zealand Shipping Company, Limited* (⁴), which is at first sight much more favorable to the appellant, there were special circumstances on which the decision might very well have been founded, but to which (as it does not appear to me to have been, in fact, founded upon them) I do not more particularly refer. The distinctions between that case and the present (whether the doctrine laid down in it can be supported, or not), are, that there no express reference was made in the contract to the custom of the port, and that, if such a reference ought to have been implied, no custom or other circumstances existed, which would have made it impossible for the charterer, by the use of reasonable diligence, to provide himself with lighters for the discharge of the

(¹) 2 Camp., 483.

(²) Law Rep., 4 Q. B., 127; 5 Q. B.,

(³) 2 Camp., 488.

544.

(⁴) 4 Ex. D., 165 n.; 81 Eng. R., 436.

cargo earlier than he did. What the Lords Justices in that case held was (in Lord Justice Cotton's words) that "an 610] *obligation was imposed upon the charterer of providing at the port of discharge sufficient appliances of the kind ordinarily used at the port;" and it was expressly added that he would not have been bound to provide appliances which were not in use there, but which might be in use at other ports.

In the present case it appears to me to be the true result of the evidence that the Cumberland Lassie was discharged "with all dispatch according to the custom of the port." In the construction of this contract, I think that the words "according to the custom," &c., ought to be read in connection with the word "dispatch." Looking at the natural conditions and the rules of the port, its distance from any other port, the necessity for the use of the warp, and the control over the warp possessed by the East London Landing and Shipping Company, I do not think that the insufficiency of the number of lighters available to discharge simultaneously all the ships lying outside the bar of East London, when the Cumberland Lassie arrived there, can be regarded as an impediment to the due discharge of that ship, collateral to or separable from the custom and practice of the port, against which the charterers ought to have provided, or for which they ought (as between themselves and the shipowner) to be held responsible.

I, therefore, propose to your Lordships to dismiss the present appeal with costs.

LORD HATHERLEY: The appellant was the owner of the ship called the Cumberland Lassie, and as such chartered her to the respondents, the Freelands, by a charterparty dated the 28th day of April, 1875.

The ship was to proceed to Barrow-in-Furness, and to take on board a cargo of steel rails and fastenings, and to proceed to East London (Cape of Good Hope) "to discharge at any safe wharf where ships can always lie safely afloat as ordered on arrival, or as near thereunto as she can safely get, and there deliver the same."

The document contained the following provisions: "The cargo to be brought to, and taken from alongside at merchants' risk and expense." "Twelve running days, Sundays and holidays excepted, are to be allowed the merchants, 611] if the ship is not sooner *dispatched for loading the cargo as above, any days on demurrage over and above the said lying days at £5 per day."

“The cargo is to be discharged with all dispatch according to the custom of the port.”

Now the facts proved in evidence are, that East London is a bar harbor, requiring great care and attention in unloading vessels, because they cannot safely carry on the operation until the vessel to be unloaded has been lightened of a great part of its cargo by means of lighters, which are guided across the reef into the harbor, by a process of warping along a hawser taken over the reef to which other ropes are fastened. The supply of lighters appears to be scarcely adequate to the need, when there are many ships to be attended to, and it is in evidence that in the autumn months, when there are sometimes (as was the case in this instance) thirteen ships to be attended to, Mr. Walker, a retired harbor-master, says that three months would be required for discharging a ship of the size and laden with a cargo like the *Cumberland Lassie*. This scarcity of lighters seems to arise from a practical monopoly of the lighters and the warping-rope, the business of unloading having been conducted by the government originally, but afterwards by a company, which bought the concern from the government.

As a consequence of the supply of lighters not being adequate to the discharge of all vessels as they arrive, there has arisen a custom, or rather usage, of the port by which any vessel arriving is marked for its turn according to the arrival, but with a preference to government mail steamers.

It appears that the *Cumberland Lassie* was unloaded in the usual way, and that the days occupied, including those in which it had to wait for its turn (being the days in question in this suit), were not more than the number of days usually occupied during the period of the year by vessels of its size and burden.

It appears to me from the evidence and the cases cited at the bar, that the charterers (the respondents) have not been in any default in respect to the engagements entered into on their part in the charterparty, viz., “to discharge the ship with all dispatch according to the custom of the port.”

The cases show that when a specific time is named, either in words or by necessary implication, the party who [612] has contracted to unload a ship within the time must bear the loss occasioned by any excess of time, although the delay was not occasioned by any default on his part; for, as was said by Lord Tenterden in his work on Shipping (in a passage quoted by Mr. Justice Blackburn in delivering the judgment of the Court of Queen's Bench in *Ford v. Cotes-*

worth ('), "he has engaged that it shall be done." But all that is engaged to be done here "is to proceed with all dispatch according to the custom of the port." Such an engagement might not, perhaps, excuse the merchant from the consequences of any unusual accident arising to delay the discharge of the vessel beyond the customary time of discharge: see *Barker v. Hodgson* ('), cited also in *Ford v. Cotesworth* ('), because the merchant has contracted that the discharge shall take place within a given time, viz., that of the usual period for discharge of a like vessel in that particular port, and the shipowner is entitled to have his ship back at the expiration of that time or to be paid demurrage, whatever be the cause of delay. But when the contract merely engages that the merchant shall with all dispatch, according to the custom of the port, unload the vessel, he will be, as it appears to me, fulfilling his contract if he employs all the usual methods of dispatch, and especially the warps and lighters usually so employed, and especially also, when, in fact, a dispatch was obtained as great as in the case of any other ship of the same size and burden.

I do not think that the merchant has engaged that he will use any other means of dispatch than those used habitually at the port. It is suggested that he should have taken care that the supply of lighters should be adequate without delay to attend to his ship; but this would be to adopt a course which there is no evidence that anybody frequenting the port ever adopted. So far is that from being the case that no ship is shown ever to have adopted any other course than that which was used by the defendants, nor has the argument suggested any usual course as having been omitted by the merchant, which will also be a course coinciding with the usage of the port. Any other course would be outside the contract, and if it failed, as it probably might when [613] *adopted for the first time, the consequent result would be a breach of the existing contract to which the demurrage might be attributed. The course taken as to turns seems to me part of the usage. I agree, therefore, with the Lord Chancellor that the appeal should be dismissed with costs.

LORD BLACKBURN: My Lords, the question in this case, in my mind, depends on what, on the true construction of the ordinary clause in a charterparty, "the cargo to be brought to and taken from alongside at merchant's risk and expense," is the extent of the implied undertaking on the part of the merchant to provide lighters or other appliances

(') Law Rep., 4 Q. B., 136.

(') 3 M. & S., 269.

for taking the cargo from alongside. The parties to the charterparty may, by any stipulations they please, alter the undertaking which would otherwise be implied; but in the charterparty now before this House I think they have not done so. The only other reference to the discharge of cargo is, "the cargo is to be discharged with all dispatch according to the custom of the port." I do not think that this alters the question, as the express reference to the custom of the port of discharge is no more than would be implied. For I take it that a charterparty in which there are stipulations as to loading or discharging cargo in a port, is always to be construed as made with reference to the custom of the port of loading or discharge, as the case may be. See *Hudson v. Ede* (*), though it was expressly found in that case that the shipowner and his broker were not aware of the usage. In the case of *Wright v. New Zealand Company* (*), the judges of appeal were of opinion, as Bramwell, L.J., expresses it, that the merchants were bound "to have lighters ready to discharge her forthwith, and were not entitled to excuse the omission on the ground that at the port of discharge there was only a certain number of lighters, and when the plaintiff's vessel arrived, other ships belonging to other persons required those lighters, and the defendants got lighters for unloading the cargo as soon as they could. "To my mind" says he, "those circumstances afford no answer to the *plaintiff's complaint; the defendants [614 having undertaken to unload the vessel were bound to be ready to do it, and to finish it within a reasonable time." And the other members of the court express the same idea.

I think that if the true construction of the clause, "cargo to be brought to and taken alongside at merchant's risk and expense," is that the merchant undertakes to be ready with lighters to discharge the vessel, the subsequent clause inserted in this charterparty for the shipowner's benefit that "the cargo is to be discharged with all dispatch according to the custom of the port," could not have been intended to relieve him from that undertaking. But the question now to be decided, as I think, is, whether there is an undertaking to that extent.

The facts which are sufficient to raise the question in the present case are few, and are not in dispute. By the charterparty between the plaintiff, as managing owner of the *Cumberland Lassie*, and the defendant, the ship was to proceed to Barrow-in-Furness, and there load a cargo of steel

(*) Law Rep., 2 Q. B., 566; affirmed,
L. R., 8 Q. B., 412.

(*) Law Rep., 4 Ex. D., 165, n.; 31
Eng. R., 486.

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rails and fastenings, "and being so loaded shall therewith proceed to East London, Cape of Good Hope, to discharge at any safe wharf where ship can always lie safely afloat, as ordered on arrival, or so near thereunto as she can safely get, and there deliver the same, on being paid freight as follows." * * "The cargo to be brought to and taken from alongside at merchant's risk and expense."

"Twelve running days, Sundays and holidays excepted, are to be allowed the said merchants (if the ship is not sooner dispatched) for loading the cargo as above. Any days on demurrage over and above the said lying-days at five pounds per day. The cargo is to be discharged with all dispatch according to the custom of the port."

The ship sailed with the cargo on board, and arrived off East London on the 31st of August, 1875. East London is a bar harbor, and a vessel of the burthen of the ship in question could not cross that bar until a considerable part of the cargo was discharged; and it is not disputed that the Cumberland Lassie brought up at the usual place of discharge, about a mile outside the bar, and was there on the first of September, 1875, and there remained with the captain and 615] crew ready to do their part in *discharging the cargo as soon as any lighter came alongside. No lighter came alongside till the 6th of October. The plaintiffs the shipowners can in no way be considered the authors of this delay, which, *prima facie* at least, was an unreasonable time to keep the ship waiting for lighters; and the question seems to me to be whether the merchants are to be considered the authors of this delay, or, in other words, whether they, the respondents, showed a sufficient excuse for this delay. The facts proved seem to be not disputed.

It appears that the colonial government had laid down a warp, which was anchored inside the bar in the river, and carried across the bar and anchored outside to a buoy; and this warp had been made over to a company called the East London Shipping and Landing Company. The lighters in use at the port are decked boats fitted with two horns, and by placing the warp between these horns and along the deck the crew of the lighter are enabled to warp the vessel out across the bar to the buoy outside.

From the buoy the lighter is taken to the ship, being hauled either by lines sent from the ship, or, sometimes, by tugs. The loaded lighter is brought back to the buoy, and then warped back over the bar. Lighters cannot be thus taken across the bar by means of the warp except when the weather permitted it to be used. But between the 1st of September

and the 6th of October there were twenty-five days in which the warp could be worked.

The company had only four lighters there fit to carry rails; the government authorities there, who were the consignees of the railway iron, obtained three more; so that there were seven in all; and it is not in dispute that, as far as concerned the use of the warp, more lighters could have been utilized if they had been there. There were waiting for discharge thirteen ships which had arrived before the *Cumberland Lassie*. The seven available lighters were appropriated to the ships in turn as they had arrived, and the *Cumberland Lassie* did not get her turn till so many of those thirteen were discharged as to set a lighter free.

The discharge of the ships previously in port was proceeded with as rapidly as was possible with that limited number of lighters. But if there had been either fewer ships waiting, or more lighters available, this ship would not have been kept so long. There was *evidence that the number of the ships was unusually great, owing to the fact that the railway material was then being discharged. [616

The counsel for the appellants did not, at your Lordships' bar, think it necessary or desirable to enter farther into the facts, as, if the delay in the beginning to unload was not excused, the verdict for the defendant ought not to stand.

The case came on for trial on the 13th of March, 1878, before Lord Coleridge and a special jury. The jurors were told, and I think quite correctly, that "custom" in the charterparty did not mean custom in the sense in which the word is sometimes used by lawyers, but meant a settled and established practice of the port, and it was then left to them to say whether there was such an established custom, and if the *Cumberland Lassie* was unloaded with all dispatch under the circumstances. And in leaving this to the jury he told them in effect that they were to take into account the circumstances as they were, though the number of ships was unusually great, and the number of available lighters fewer than could have been worked by the warp. I should observe that it appears to be clear that no lighters could have been obtained from any other port in a less time than was occupied in discharging the ships that had arrived before the *Cumberland Lassie*; so that no question was raised as to whether, if there had been such, the merchant ought to have obtained them. The only question raised on the facts was that on which Lord Coleridge thus directed the jury. It is not disputed that if the direction was right, the verdict for the defendant was justified. It seems to me clear that if the

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view of the law afterwards laid down by Bramwell and Cotton, L.JJ., and, I am inclined to think, as reported, by Thesiger, L.J., also, in *Wright v. New Zealand Company* (¹), is correct, this was a misdirection.

The present cause was brought before the Court of Appeal, then consisting of Brett, Cotton, and Thesiger, L.JJ., shortly after that court, then consisting of Bramwell, Cotton and Thesiger, L.JJ., had given judgment in *Wright v. New Zealand Company* (¹). Cotton, L.J., adhered to the view of the law he had taken in that case, and thought there should be a new trial. Thesiger, L.J., distinguished the cases, not [617] to my mind successfully, and thought *the direction in the present case right; and as Brett, L.J., agreed with him, judgment was given for the defendant. The appeal is against that judgment.

As the two decisions—that in the present case and in *Wright v. New Zealand Company* (¹)—were almost contemporaneous, and were on applications for new trials in cases tried at the same assizes, and almost contemporaneously, I think this must be treated as an appeal from both these cases; so that your Lordships have the opinions of Bramwell and Cotton, L.JJ., on one side, and Brett and Thesiger, L.JJ., on the other,—a balance of authority as nearly equal as could well be. It is very singular, considering how long charterparties having a clause in this form have been in use, that there should be no direct authority on the subject; but so it is. At least the counsel at your Lordships' bar were able to cite none, and I have not been able myself to discover any. It is almost as singular that the question should at last have been raised in two cases almost at the same time, and that the Court of Appeal should be equally divided in opinion. I think your Lordships must decide on analogy to other cases, and on general principles of law; and though I have felt, and still feel, that there is a great deal to be said in favor of the law taken by those judges who are in favor of the appellants, I have come to the conclusion that the ruling of Lord Coleridge and the judgment below were right, and that this appeal should be dismissed with costs.

As the merchant, if not himself resident at the port of discharge, at all events has a consignee and correspondent there resident, he presumably knows all about the means and appliances for discharging a ship there better than the shipowner. It, therefore, seems very reasonable that the shipowner in making his bargain should require the merchant to make an estimate of the probable time of discharg-

(¹) 4 Ex. Div., 165 n.; 31 Eng. R., 436.

ing the ship, and take on himself the risk of that time being exceeded; and then the shipowner can fix the payment he is willing to take with reference to this; and this has long been done by providing lay-days and demurrage days for the discharge.

In the last edition of Abbott on Shipping published while Lord Tenterden was living, it is said⁽¹⁾, "The usual [618 clauses purporting that it is covenanted and agreed by and between the parties that a specified number of days shall be allowed for loading and unloading, and that it shall be lawful to detain the vessel for those purposes a farther specified time on payment of a daily sum, constitute a contract on the part of the freighter that he will not detain the ship for those purposes beyond the two designated periods; and if he does so detain her, he is liable to an action on the contract, in the form adapted to the nature of the instrument. If a ship be so detained, the daily rate of demurrage mentioned in the charterparty will in general be the measure of the damages to be paid; but it is not the absolute or necessary measure; more or less may be payable as justice may require, regard being had to the expense and loss incurred by the owner; and the amount must be settled by a jury if the parties cannot agree. And where the time is thus expressly ascertained and limited by the terms of the contract, the merchant will be liable to an action for damages if the thing be not done within the time, although this may not be attributable to any fault or omission on his part, *for he has engaged that it shall be done.*" These last words are put in italics by Lord Tenterden. It still remains the more usual form of charterparty to insert lay-days and demurrage days. In many of the cases cited on the argument at the bar the charterparties were of this nature, and the question only was whether the lay-days had begun to run. *Tapscott v. Balfour*⁽²⁾ was of this nature; for though the charterparty did not name a specific number of days, it provided that the ship was "to be loaded by the defendants at the rate of 100 tons per working day;" and as the burden of the ship was known, and *id certum est quod certum reddi potest*, this was equivalent to naming a certain number of days. No question could have been made, if there had been lay-days in the present charterparty, that they would have begun to run on the 1st of September.

Neither does *Thiis v. Byers*⁽³⁾ bear on the present case.

(1) 5th ed., p. 180.

(2) Law Rep., 8 C. P., 46; 4 Eng. R., 316.

(3) 1 Q. B. D., 244; 16 Eng. R., 308.

The judges there say, "We took time to look into the authorities, and are of opinion that where a given number of days is allowed to the charterer for unloading, a contract is [619] implied on his part that *from the time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitudes which may occur to prevent him releasing the ship at the expiration of the lay-days." Had there been lay-days in this case, that would have had a bearing on the question whether the days on which the weather prevented lighters from crossing the bar were to be reckoned as lay-days or not. The parties can by express agreement prevent any dispute as to this, as was done in *Hudson v. Ede* (*), though, as that case shows, they may, unless they are cautions, produce results which they did not anticipate.

But, for whatever reason, the parties who framed the charterparty in this case, and that in the case of *Wright v. New Zealand Company* (*), did not choose to have lay-days for the discharge of the vessel, and consequently it is left to the court to say what is the contract implied by law, not qualified in any way in the charterparty in *Wright v. New Zealand Company* (*), and in the present case only qualified, if at all, by the provision that the cargo is to be discharged with all dispatch according to the custom of the port. The strongest argument in favor of the appellants is, I think, this: "Is not the freighter," says Lord Ellenborough in *Barker v. Hodgson* (*), "the adventurer who chalks out the voyage, and is to furnish, at all events, the subject-matter out of which the freight is to accrue." And on this principle it was held in that case, and has been held in several others, that there is an absolute contract on his part to furnish a cargo, and that he is bound to pay damages if it becomes impracticable to do so; though it would be otherwise if it became illegal to do so. The cases of *Adams v. Royal Mail Steam Company* (*), and *Kearon v. Pearson* (*), proceed on this principle. The parties may and often do provide by express qualification that strikes, quarantine, or other impediments shall excuse the merchant. And perhaps the same effect may be produced if it appear that the contract was framed with reference to any particular state of things: *Harris v. Dreesman* (*). I am not aware of any

(*) Law Rep., 2 Q. B., 566.

(*) 5 C. B. (N.S.), 492; 28 L. J. (C.P.),

(*) 4 Ex. D., 165 n.; 31 Eng. R., 436. 33.

(*) 3 M. & S., 267, at p. 270.

(*) 7 H. & N., 386.

(*) 23 L. J. (Ex.), 210.

case *contradicting the doctrine that, in the absence [620 of something to qualify it, the undertaking of the merchant to furnish a cargo is absolute. And if the obtaining lighters or others customary appliances for the discharge of a ship on its arrival was, like the procuring a cargo for loading the ship, a matter which fell entirely on the merchant, so that he might choose his own mode of fulfilling it, I am not prepared to say that on the same principle he ought not to be held to undertake, without qualification, to provide those appliances. And this seems to be the basis of the judgments of Bramwell and Cotton, L.JJ., and, as it rather seems to me of Thesiger, L.J., also, as then expressed, though he does not adhere now to that opinion, in *Wright v. New Zealand Company* (¹), and of Cotton, L.J., in the case now at bar. But I do not think that the undertaking to supply lighters or other appliances to assist in discharging the ship does fall within the same principle as the undertaking to supply a cargo. There is no case in which it has been held so to do; and, as far as I can find, there is nothing in any of the text-books in support of the doctrine that it does; and, as it seems to me, what authority there is (I agree it is not very direct), is against the position.

In *Rodgers v. Forresters* (²) the charterparty expressly stated that "the said freighter should be allowed the usual and customary time to unload the ship or vessel at her port of discharge." The facts appearing to be that the cargo, wines, was of such a nature that it was usual and customary to unload in a bonded warehouse, and that the delay in this particular case was owing to an unusual crowd of shipping in the docks, Lord Ellenborough's ruling was that the usual and customary time was that which would be taken to discharge into a bonded warehouse in the then state of the docks. In *Burmester v. Hodgson* (³), which came on before Chief Justice Mansfield three days afterwards, the point was still more clearly raised. There was no charterparty there, the question arising on a bill of lading, but as the defendants were consignees of the whole cargo of brandies, that did not, I think, make any difference. The bill of lading was silent as to the period of discharge. It appeared that the ship entered the docks, and did not complete its discharge for sixty-three days. *It appeared, says [621 the report, to be the invariable practice to bond cargoes of this sort. Even when the cargo is bonded, if the docks are

(¹) 4 Ex. D., 165 n.; 81 Eng. R., 486.

(²) 2 Camp., 488.

(³) 2 Camp., 488.

not overcrowded, twenty or twenty-three days are a sufficient space of time for unloading.

In *Burmester v. Hodgson* ⁽¹⁾ Mansfield, C.J., said, "Here the law could only raise an implied promise to do what was in *Rodgers v. Forresters* stipulated for by an express covenant; viz., to discharge the ship in the usual and customary time for unloading such a cargo. That has been rightly held to be the time within which a vessel can be unloaded in turn, into the bonded warehouses. Such time has not been exceeded by the defendant. If the brandies were to be bonded they could not be unloaded sooner, and the defendant seems to have been as anxious to receive, as the plaintiff was to deliver them."

This was an express decision that the merchant was not responsible for the forty days' delay occasioned by the unusually crowded state of the docks. I cannot see on what principle the merchant can be responsible for the lighters being too few to unload the unusual number of ships, if he is not to be responsible for the dock being too small to unload the same unusual number.

In *Ford v. Cotesworth* ⁽²⁾, in error, it was held that the contract implied by law was not, as Mansfield, C.J., had held, a contract to discharge in the usual and customary time, but one that the merchant and shipowner should, each, use reasonable dispatch in performing his part. But this does not in the least affect the point for which the ruling in *Burmester v. Hodgson* ⁽³⁾ is in this case valuable,—that in considering what is reasonable dispatch under the circumstances, the number of ships there, though unusually large, is one of the circumstances to be taken into account. In *Taylor v. Great Northern Ry. Co.* ⁽⁴⁾ it was laid down that a "reasonable time" meant what was reasonable under the circumstances. Byles, J., there says: "My brother Hayes treats ordinary time and reasonable time as meaning the same thing; but I think reasonable time means a reasonable time, looking at all the circumstances of the case. The delay in this case was an accident, as far as the defendants were concerned, entirely beyond their control, and therefore I think they are not liable."

622] *This is, I think, right, and applicable to the present case.

The only other case which it is necessary to notice is *Ash-*

⁽¹⁾ 2 Camp., 488, at p. 489.

⁽²⁾ 2 Camp., 488.

⁽³⁾ Law Rep., 4 Q. B., 127; 5 Q. B.,

⁽⁴⁾ Law Rep., 1 C. P., 385.

croft v. Crow Orchard Colliery Company ('). There the regulations of the docks which were known to both parties, were, amongst others, "No coal agent to be allowed to load more than two flats at the cranes at the same time, nor to have more than three vessels at the docks loading and to load at the cranes at one time."

By the charterparty the vessel was to load in the docks: "to be loaded with the usual dispatch of the port."

The facts were that the defendants acted as their own coal agents, and had at the time thirteen ships which had priority of the plaintiffs; and the ship was in consequence kept outside the dock for thirty days after it was at the disposal of the defendants, but before the dock company would admit it. The decision of the court was that the contract was to load with the usual dispatch, and that this self-imposed inability on the part of the charterers to do so was no defence, even if the plaintiffs had known of it; which in fact they did not. I think this, which is probably right, has no bearing on the present case.

The result is, that I come to the conclusion that the ruling of Lord Coleridge was right, and that the appeal should be dismissed with costs. This is hard on the shipowner, who is in no default, and who probably never would have entered into a charterparty in those terms if he had thought he thereby incurred such a risk of delay. All that a court of law can do is to construe the contract as the parties have made it; so as to make it as clear as can be, what the legal effect of such a contract is. The parties can, by altering the terms of their contracts in future, avoid any inconvenience that arises from that construction. It is, no doubt, not an easy thing to introduce a new form of contract into mercantile use, but it can be done.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 7th June, 1880.

Solicitors for appellant: *Parkers*.

Solicitors for respondents: *Allin & Greenop*.

(') Law Rep., 9 Q. B., 540; 10 Eng. R., 167.

See 28 Eng. R., 210 note; 26 Alb. L. J., 323.

The consignee of a cargo of coal is entitled by the usage of the port of Chicago, which this court will recognize, to a full day of 24 hours after the vessel reports, in which to furnish her with a dock and to begin unloading:

Mitchell v. Langdon, 9 Fed. Repr., 472, 14 Chicago Leg. News, 472.

All liens are created by law or by contract of the parties, and when the law gives none, neither party can create one without the consent or agreement of the other. Hence the consignee of goods shipped by railroad is

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Postlethwaite v. Freeland.

(H.L. (E.))

not bound by rules and regulations of the railroad company providing for a lien for demurrage, though published without his or the consignor's assent thereto when the contract for shipping the goods was made. Even a knowledge of such rules, without assent thereto, will not affect the shipper or consignee. The law will never indulge in the presumption of assent to rules of a railway company for lien for dam-

ages caused by delay in receiving the goods shipped, from the publication of the same.

The right to demurrage does not attach to carriers by railroads. If it exists at all as a *legal* right, it is confined to the maritime law, and only exists as to carriers by sea-going vessels, and even then it is believed to exist alone by contract: *Chicago, etc., v. Jenkins*, 103 Ills., 588, 599, 600.

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A.

ABATEMENT.

See EXECUTORS AND ADMINISTRATORS, 518,
516 *note*.

ACCORD AND SATISFACTION.

See PLEADINGS, 738.

ADMIRALTY.

1. *Charterparty*. The duty of providing, and making proper use of, sufficient means for the discharge of a cargo, when a ship, which has been chartered, arrives at its destination, and is ready to discharge, lies upon the charterer. But that general duty may be qualified by words in the charterparty, and by the circumstances of the case. If, by the terms of the charterparty, the charterer has agreed to discharge the ship within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it. If there is no fixed time, the law implies an agreement, on his part, to discharge the cargo within a reasonable time.
2. *Per LORD HATHERLEY*: When the covenant merely engages that the merchant shall with all dispatch, according to the custom of the port, unload

the vessel, he will fulfil his contract if he employs all the usual methods of dispatch at the port.

3. A charterparty was entered into by which a vessel was to take on board a cargo of steel rails and fastenings, and proceed therewith to the port of East London, in South Africa. In the charterparty was this stipulation: "The cargo is to be discharged with all dispatch according to the custom of the port." The discharge of such a cargo could only be effected there by a warp and lighters. These were under the absolute control of a company, to which the governmental authorities had transferred all their powers. The company allowed vessels the use of the warp and lighters in turn, making no exception in favor of any vessel except mail steamers, which on arriving were provided for to the exclusion of other vessels, whether of the government or of private individuals. The ship arrived at the port, found a great number of vessels there, the number of lighters was insufficient, and the ship could not obtain its "turn" until more than thirty-one working days had elapsed after its arrival. There was no delay attributable to the master or crew except what was thus occasioned by the custom of the port:
Held, that in this case the shipowner was not entitled to maintain an action against the charterer for demurrage. *Postlethwaite v. Freeland*, 820, 841 *note*.
4. *Collision*. It is dangerous to the public to leave to masters of vessels a discretion as to obeying or departing from

the sailing rules; and accordingly such a discretion need not be exercised except in cases of very clear necessity.

5. Where a collision has occurred owing to one colliding vessel having failed to observe (as its duty was) the rule of the road, by keeping out of the way, *held*, that in the absence of proof as to the particular time at which an intention to violate that rule was clearly manifest, the other colliding vessel, being *prima facie* bound to observe the 18th rule by keeping on its course, would not have been justified in departing therefrom. *The William Frederick*. 444

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See FRAUD, 12, 26 *note*.

ANSWER.

See PLEADINGS, 31.

APPEALS.

1. Although costs may not be added to the amount recovered in estimating the appealable sum, yet interest on a verdict, given by statute, payable from the time of obtaining such verdict until the time of entering up the judgment appealed from, and included in such judgment, is to be considered in estimating such appealable sum. *Bank, etc., v. Owston*. 187
2. *Semble*, that no appeal will lie to this House from the Landed Estates Court in Ireland upon any question of the amount offered for the purchase of an estate sold in that court, or of the person who is the proposing purchaser.
3. The 33 & 34 Vict. c. 46, the Landlord and Tenant Act (Ireland), 1870, provides, ss. 46-47, that where an estate is to be sold in the Landed Estates Court, facilities shall be given to occupying tenants to become purchasers of their holdings.
4. P., the trustee of an estate with full powers of sale, became the petitioner

for the sale of it in the Landed Estates Court. Many of the tenants desired to become purchasers of their holdings. Several meetings were held by the parties interested. H. offered £80,500 for the estate. Several of the tenants were not satisfied that his proposal contained arrangements sufficiently advantageous for them, and raised objections. Two persons, L. and M., who appeared to act as representatives of the dissenting tenants, offered £81,000 (or £500 more) for the estate. Their arrangements as to the ultimate sales of the holdings to the tenants appeared to satisfy the tenants. Proceedings were had in the court, in which P. and H. and L. and M. became formal parties. The tenants themselves were not parties to these proceedings. The judge of the Landed Estates Court, after a full hearing, decided that the offer of L. and M. ought to be accepted. On appeal this decision was reversed, and the conveyance ordered to be executed to H. No appeal against that order was made by L. and M. Several of the tenants proposed to appeal against it in respect of matters relating to their own interests:

Held, that it was not competent to them to sustain such appeal; that as L. and M., who were parties to the proceedings below, had not appealed, those who had put themselves under the guidance of L. and M., but who had not been parties to the proceedings below, could not now constitute themselves parties for the purpose of raising an issue which had never been raised in the court below. *Walsh v. Pemberton*. 517 and *note*.

ARBITRATION.

1. Friendly societies and benefit building societies do not stand on the same footing.
2. The provisions of the Friendly Societies Act (10 Geo. 4, c. 56) as to the framing, &c., of rules are, by sect. 4 of the 6 & 7 Will. 4, c. 32, made applicable to benefit building societies established under that act.
3. A benefit building society made certain rules, one of which was, that in case of any dispute arising between the society and any member thereof, reference shall

be made to arbitration, pursuant to the 10 Geo. 4, c. 56. L. became a member of the society and executed certain mortgages to the persons who acted as its trustees. In these mortgages he covenanted, among other things, to observe the rules of the society. L. did not keep up the payments secured by the mortgages, and the trustees took possession of some of the mortgaged premises, and sold them. L. brought an action praying for accounts, and an injunction to prevent future sales, &c. The trustees insisted that he was, by the rules, precluded from any right of action, and must proceed by arbitration under these rules:

Held, that the rules did not preclude him from a right of action, for that proceedings in respect of accounts under a mortgage and sale of the property, which might include title to redemption or a judgment of foreclosure, were not such disputes, between the society and a member, as the statutes had contemplated.

4. *Per* LORD O'HAGAN: The *onus* of showing that a complaining party has lost the ordinary right to maintain an action lies on him who denies such right. *Mulkern v. Lord*. 114, 127 *note*.

5. The words of the 68th section of 8 & 9 Vict. c. 118 (the General Inclosure Act), are positive that all roads and ways not set out by the valuer on making his award, "shall be forever stopped up and extinguished."

6. H. was possessed of lands in a neighborhood where the General Inclosure Act was about to be applied. He sold some of these lands to T., expressly reserving to himself the allotments that might afterwards be made. The conveyance to T. contained the usual words, "together with all ways, paths, passages, easements, privileges, advantages and appurtenances to the said lands appertaining, or held, used, or occupied therewith." Between the lands purchased by T. and the high road there were certain wastes over which the former holder of T.'s land had, for about forty years, enjoyed the use of certain paths and trackways—which were paths and trackways of convenience, but not of necessity. The wastes were allotted to H.: the valuer, to whom T. had not preferred any claim of right to

the paths and trackways in question, made his award, in which other paths and ways were set out, but not those from T.'s lands to the high road. Before the award was made H. had sold his interest in the allotments to C. who, after the making of the award, refused to allow T. the use of the ways in question:

Held, that by the effect of the award they had been stopped up and extinguished, and that the conveyance by H. did not bind him to grant new easements over any land he might acquire by the allotment. *Turner v. Crush*. 183

7. A clause which stipulates that all matters in difference which should arise touching the agreement should be submitted to arbitration, and prohibits any action being brought in respect of the matters actually submitted to arbitration, is a collateral and independent agreement, and an award thereunder is not a condition precedent to such action, except as regards such sums as under the agreement are not payable until the amount thereof has been ascertained by such award. *Collins v. Locke*. 448

ARCHITECT

See ARBITRATION, 114, 127 *note*.

B.

BANKERS' LIEN.

1. Bankers most undoubtedly have a general lien on all securities deposited with them as bankers by a customer, unless there be an express contract or circumstances that show an implied contract inconsistent with the lien.
2. *Held*, that the bankers having acquiesced in the finding of the first court, that the securities deposited with them were in respect of specific sums and not on the general account, and not having objected thereto in their grounds of appeal to the Supreme Court, were precluded from raising that question in appeal to the Privy Council.

3. Simple interest only should be allowed on such specific amount, as to a mortgagee.
4. Bankers improperly or without title retaining moneys overpaid to them as mortgagees are chargeable with interest thereon. *London, etc., v. White.* 312, 324 *note*.

BANKRUPTCY.

1. A release of an insolvent's equity of redemption to the mortgagee is not *prima facie* beyond the scope of an official assignee's authority; and sect. 27 of the "Insolvency Statute 1865," of Victoria, clearly contemplates the exercise of such authority.
2. Where the consideration for such a release is an agreement not under seal by a corporation (mortgagee) to abstain from proving any portion of its debt, and such agreement has been acted on by accepting the release, *held*, that the corporation is bound thereby, and that the consideration has not failed. *Melbourne, etc., v. Brougham.* 108
3. Where traders possess two properties, one situated abroad, and the other situated in this country, and there has been a petition for adjudication here, followed immediately, in point of date, by proceedings in insolvency abroad, and the foreign court takes possession of the foreign property, as under a *censio bonorum*, and employs it in paying the foreign creditors a dividend, such creditors cannot afterwards prove under the English adjudication, except on the condition of first accounting for what they have received abroad.
4. Two persons of the name of H. carried on trade in Portugal as wine exporters, under the style of H. Brothers, and the same two persons carried on trade in London as wine merchants, under the style of H. & Sons. The practice of the business was for H. Brothers to draw bills on H. & Sons. These bills were accepted in London and paid in Portugal. The traders fell into difficulties, and in December, 1877, presented a petition for adjudication under the English Bankruptcy Act. Proceedings in insolvency were taken in Portugal, after the date of the petition but before that of the adjudication, and the Portuguese court took possession of the property there, and the Portuguese creditors received a dividend of about 8s. in the pound. These creditors then sought to prove under the English adjudication. This was refused otherwise than as a claim, until they had accounted for what they had received under the Portuguese insolvency: *Held*, that this conditional admission of their claim to prove was correct.
5. The adjudication had relation back to the petition, from the date of which all the property of the traders abroad and in England became vested in the trustee.
6. The Statutes of Bankruptcy, 1861 and 1869, have no application to a case of two bankruptcies, either in the same country or in different countries, against identically the same individuals.
7. *Per LORD SELBORNE*: The cases of *Maccabe v. Hussey*, and *Atwood v. Small* in no way warranted the supposition that this House would, on appeal, admit evidence not presented in the court below. *Banco, etc., v. Waddell.* 672

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See GOVERNOR, COLONIAL, 648, 654 *note*.

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See EXECUTORS AND ADMINISTRATORS, 468,
485 *note*.

CONDITION PRECEDENT.

See ARBITRATION, 448.

CONFUSION.

1. A. was the owner of a small feu of
about an acre and a half in extent.
The surface of the ground was occu-

pied by miners' cottages, and under-
neath was coal. When A. purchased
the feu, he was under the impression
that all the minerals under the feu, as
under all the ground surrounding it,
had been reserved to the superior; but
that was a mistake, for in the deed
granting the feu there was no reserva-
tion of coal. The superior granted the
whole property in the coals in all the
surrounding land to R. and C. They,
under the impression that they had
the whole of the coal, including the
coal under the acre and a half, worked
out and disposed of the coal under A.'s
acre and a half; and in doing so dam-
aged the surface.

A. could not have worked the coal
to profit himself: there was no person
to whom he could dispose of it but to
R. and C.; and the element of wilful
trespass, and the element of special
and exceptional need of support to the
surface, were absent.

In a claim by A. for (1) the value of
the coal; (2) a sum for "way-leave"
and the advantage obtained by work-
ing through instead of round the feu;
and (3) for damages done to the houses
on the surface:

Held, affirming the decision of the
court below, that the value of the coal
taken must be the value of the coal to
the person from whom it is taken, at
the time it is taken, and that the best
evidence in the peculiar circumstances
of this case of that value was the roy-
alty paid by R. and C. for the sur-
rounding coal field; therefore A. was
entitled to the lordship on the coal ex-
cavated, calculated at that rate; to-
gether with the payment of a sum for
damage done to the houses on the
surface.

2. *Held*, also, that as the question of
"way-leave" was not argued before
the First Division of the Court of Ses-
sion, it could not be entertained in this
House. *Livingstone v. Raygards, etc.*
622, 638 *note*.

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COPYRIGHT.

1. An infringement of the registered copyright of the music of an opera may be committed where the opera itself has not been published, and so no copy of it could be deposited, and where that music having been made the subject of two piano "arrangements," one without the voice, another for the voice, and, those arrangements having been published, the infringer has used them for his own production.

2. In such a case the question of what was intended to be registered will be considered with reference to all the parts of the register, and if certain portions of the forms of registry are, in the particular case, unnecessary and unmeaning, the introduction of them will not affect those portions of the register which are correct.

3. Offenbach composed, in Paris, the music of an opera called "Vert-Vert." S., by his permission, made two "arrangements" of the music, one for the piano without, the other for the piano with, the voice. The opera was produced at the Opera Comique, in Paris, on the 10th of March, 1869, but was never, as a whole, printed. The two arrangements were printed in a book published in Paris, at 10 Rue de la Chaussée d'Antin, on the 28th of March, 1869. B. became the assignee of the music of the opera, and also of the "arrangements." He sought to register them in England. He filled up the statutory forms required for that purpose. One column of those forms had, in the lower portion, the heading, "Time and place of first representation," and the words, "Théâtre Impérial de l'Opera Comique, Paris, France, 10th March, 1867," but the upper portion of the same column had the words,

"Time and place of first publication," under which were the figures and words, "28th March, 1869. 10 Rue de la Chaussée d'Antin, Paris, France." The form relating to the assignment of the music of the opera was correct in the first two columns, but in the third, under the heading, "Assignee of copyright," were, first of all, the name and residence of B., and then the words, "as assignee of the copyright in the music of the *said* book, and also of the right of publicly performing such music." The written but unpublished music of the opera was not deposited at Stationers' Hall: the "book" containing the pianoforte arrangements was deposited there. F. produced a dramatic representation calling it "Vert-Vert, music by Offenbach," the music being taken from the "arrangements," but the words were supplied by English writers:

Held, that there had been a sufficient registration of the music of the opera, that this registration was not affected by the reference to the "book" of the arrangements, and that F. had been guilty of an infringement of B.'s rights. *Fairlie v. Boosey.* 493

CORPORATIONS.

See DIRECTORS,
PRINCIPAL AND AGENT, 187, 207 *note*.
STOCKHOLDERS, 675.
ULTRA VIRES, 744, 768, 783 *note*.

CORPUS.

See LIFE ESTATE, 810, 819 *note*.

COSTS.

See EXECUTORS AND ADMINISTRATORS, 513, 516 *note*.

D.

DAMAGES.

1. Case in which compensation for damage done to an estate was awarded once

for all, so as to take away any right of action for subsequent damage against the defendants, who were held to be not wrongdoers, but persons exercising their rights of mining operations over the land of the plaintiff, subject to paying compensation for the permanent injury thereby occasioned to the said estate. *Great Lacey, etc., v. Clague*, 86

2. Where a plaintiff had obtained against a railway company a verdict with damages sustained by reason of an accident to a train in which he was a passenger, and a new trial was ordered by the Court of Queen's Bench on the ground alone of excessive damages, the finding as to negligence by the defendant company being approved by two courts:

Held, that inasmuch as there had been no misdirection, the judge having put to the jury whether all was done which was reasonably and practically possible under the circumstances of the case, and inasmuch as the damages were not of such an excessive character as to show that the jury had been either influenced by improper motives or led into error, there ought not to be a new trial. *Lumbkin v. South Eastern, etc.* 727, 736 *note*.

See CONFUSION, 622, 638 *note*.

LIFE ESTATE, 787, 805 *note*.

DEFAMATION.

1. Declaration, that the plaintiff, a certificated master mariner, having been employed as master of certain vessels, his services were retained by the proprietor of ship U.; that he was getting ready to take command thereof when he found that the defendant insurance society had intimated to the said proprietor that if the plaintiff were to take command of her the society would refuse to continue to insure her; that he then took certain steps in order to induce the society to reconsider their resolution or to give him an opportunity of refuting the reasons they might have for it, but in vain; that by reason of this proceeding on the part of the society he had lost his employment, and that this arbitrary and vexatious conduct on the part of the society caused him considerable damage in depriving him of his employment, and

consequently of the means of providing for and maintaining his family—praying that the conduct of the society might be declared illegal, arbitrary, and vexatious, and that they might pay damages £500.

Plea in effect that the defendants acted upon information which they believed to be true that the plaintiff was addicted to intemperance, that they communicated their refusal to insure, but not their information, to the defendants, that they did so in good faith, and without any malice towards the plaintiff, without any desire to injure him, and in the honest belief that the information they had received was sufficient to justify the course which they took:

Held, that such defence (if proved) was a sufficient answer to the *prima facie* cause of action disclosed by the declaration. The representation made by the defendants was clearly one made in the conduct of their own affairs and in matters in which their own interest was concerned:

2. *Held*, further, that such defence was established by proof that the defendants had received such information, and had reason to believe it to be true, without conclusively establishing habits of intemperance against the plaintiff as upon a plea of justification. *Hamon v. Falle*. 166

DEMURRER.

See LIMITATIONS, STATUTE OF, 31.

DIRECTORS.

1. A. and B., trustees for C. and D., accepted, as part of a trust estate, stock in a Scotch banking company. By the deed of copartnership, there was to be no limit whatever to the shareholders' liability. They signed the deed of transfer "as trust disponees," and accepted the stock "as trust disponees foresaid, subject to the articles and regulations of the said company in the same manner as if they had subscribed the contract of copartnership." Their names and addresses were entered in the stock ledger (the register of shareholders),

followed by the words "as trust disponees" for C. and D. The individual names of A. and B. did not appear in any list of shareholders issued to the public.

The bank suspended payment with immense liability. The liquidators placed A. and B. on the first part of their list of contributories as liable to calls "in their own right." In a petition to rectify the list of contributories, by transferring the names of A. and B. from the first part to that part entitled "second part—contributories as being representatives of others":

Held, affirming the decision of the court below, that the trustees, A. and B., were partners of the company, and as such were personally liable for payment of all calls made on them in respect of the said stock.

2. *Held*, also, that a distinction between partners, with limited and unlimited liability, was repugnant to the whole nature of the deed of partnership.

3. *Per LORD CAIENS, L.C.*: The words "as trust disponees" were added to the names of the trustees to mark the stock as property of the particular trust; to show that the stock was held on a joint account with a right of survivorship; and possibly with a third purpose—to give a peculiar facility under the law of Scotland to a trustee to retire from the trust.

4. *Per LORD PENZANCE*: Where trustees join in a contract of partnership for trading purposes, the mere designation of them as trustees will not exempt them from the same personal liability as is undertaken by the other shareholders.

5. *Per LORD BLACKBURN*: Trustees, not created by a statute, are not by the law of Scotland a body corporate or a quasi corporation. *Muir v. Glasgow Bank*, 236, 286 note.

See STOCKHOLDERS.

DIRECTORY.

See STATUTES, 674 and note.

DISEASED FOOD.

See FRAUD, 12, 26 note.

DUTCH LAW.

See WILLS, 658.

DUTY.

See FRAUD, 12, 26 note.

E.

EASEMENTS.

See ARBITRATION, 133.

EMINENT DOMAIN.

1. A railway company purchased, by private agreement, without any preliminary notice to treat, certain lands, in amount nineteen acres, under which were mines of iron ore. These mines were specifically conveyed to the company. By the private act incorporating the company the railway was to be finished in 1851. By warrant of the Railway Commissioners that time was extended to 1853. The company had used six of the nineteen acres in railway works—on certain spots of the remaining thirteen acres a drain, a cesspool, and a passage for water supply had been constructed, but no buildings had been erected, nor rails laid down. The railway was finished, but at the expiration of ten years from 1853 no sale of the lands took place. In December, 1849, the company had let the lands to a tenant from year to year, and he used them for agricultural purposes. In August, 1871, the company let the lands (again under a tenancy from year to year) to an iron mining company under a license to work the iron ore. In each of these agreements the directors reserved the absolute right (in the case of the iron com-

pany upon twenty-eight days' notice), to re-enter on the lands, and in the lease to the iron company the mining was to be done subject to the approval of the railway company and of that company's engineer. In 1875 an action of ejectment was brought to recover the lands as lands which, under sect. 127 of the Lands Clauses Act, 8 & 9 Vict. c. 18, had vested in the plaintiffs as "adjoining owners." There was a reference to a barrister to state a case for the opinion of the court. The case set forth in one of the paragraphs, that since 1868 the railway traffic had much increased, and that the lands "had been, and still were, required for the purpose of constructing additional sidings upon them to accommodate the increased traffic," and gave reasons of business which had influenced the railway directors in not making these sidings. The Queen's Bench Division had held that under these circumstances the lands were not to be considered as "superfluous land" which became vested in the adjoining owner—and that decision was affirmed by the Court of Appeal:

Held, that the decisions of the courts below must be affirmed.

2. In a case of this kind the burden of proving a title to the land, as superfluous land, lies upon the claimant.
3. The mere fact that the land has not been built upon is not conclusive—all the circumstances must be considered.
4. The fact that the lands were in the neighborhood of a populous town was a circumstance to raise a presumption that the lands would be wanted on account of increased traffic on the railway.
5. And, *semble*, that the fact that they were so wanted in 1868 raised a reasonable presumption that in 1863 the want of them for railway purposes had been foreseen.
6. *Per THE LORD CHANCELLOR (Earl Cairns)*: If a railway company purchases land and the minerals under its surface, and the surface is not at that time wanted for the purposes of the railway, but afterwards becomes so, and can be used without requiring the support of the minerals, *quære* whether

there is any authority which requires the company to sell the minerals apart from the land, or, in default of such sale, vests them in the adjoining owner.

7. *Per LORD HATHERLEY*: Questions as to superfluous lands have proceeded, at all times, upon the *bona fides* of the transaction.

8. *Per LORD O'HAGAN*: An actual present intention to employ the land for the purposes of the railway need not have been formed within the prescribed time, in order to prevent a forfeiture at the end of it. *Hooper v. Bourne*. 601

9. The Lands Clauses Consolidation Act, 1845, contained special provisions with regard to claims for compensation for lands affected by the works of a railway, and directed that (except in certain specified cases) compensation should be awarded with costs. A special act (38 & 39 Vict. c. cccviii.) declared that the provisions of the general act were, "except where expressly varied by the special act," incorporated with it. The general act provided the forms of proceedings in arbitrations—such as the appointment of arbitrators by the contending parties, and the appointment of an umpire by the arbitrators, and declared that compensation might be recovered with costs. The special act directed that arbitrations conducted under its provisions should be conducted by an arbitrator appointed by the Board of Trade, but contained no specific directions as to the award of costs. An arbitration of this sort took place under the special act. The arbitrator awarded compensation, but said nothing as to costs:

Held, that the claimant was entitled to costs, for that the substitution of one form of proceeding in the arbitration different from that in the general statute, expressly varied the provisions of the general statute as to that matter, but did not repeal the provision as to costs in the general statute, nor affect the general rule that the party succeeding in such an arbitration should recover costs: /

10. *Held*, also, that the right to costs was entirely independent of the taxation of them, and an action could be maintain-

ed for the costs though the amount of such costs had not been previously settled or ascertained by taxation; and consequently an order for the taxation made by the learned judge on giving his judgment for the plaintiff, was a valid order.

11. *Per THE LORD CHANCELLOR (Lord Selborne)*: In construing acts of Parliament of this kind, and adjusting the general provisions in the general act to the particular provisions of the special act, considerations of reason and justice and the universal analogy of such provisions in similar acts of Parliament, ought to have much weight and force. *Metropolitan District Railway v. Sharpe.* 745

See STATUTE, 641.

ESTATE TAIL.

See WILLS, 746.

ESTOPPEL.

1. For the purpose of having a contract of sale of a concession set aside on the ground of fraud, and repayment of the purchase-money, £65,000, with interest, a company filed a bill of complaint in the English Court of Chancery.
2. At the same time they lodged a claim to be ranked, for the same sum, upon the estates of a firm carrying on business in Edinburgh and London, which had been sequestrated in Scotland. In the claim, the company described the debt as owing under the circumstances set out at length in the bill in chancery "produced and held as repeated *brevitatis causâ.*" To the chancery suit the trustee of the sequestrated estates was a party. The trustee having rejected the claim, the Lord Ordinary ordered a condescendence and proof. The proof was adduced on the 16th of June, 1874. The Court of Session, and ultimately, this House, held that the claimants were not entitled to the debt claimed against the sequestrated estates; and refused to sist the pro-

ceedings in the sequestration, pending the issue of the chancery suit (1 App. Cas., 780).

3. The bill in chancery as filed alleged certain *indicia* of fraud; afterwards additional evidence of fraud was discovered, in time to have it inserted by way of amendment. The bill was finally amended on the 3d of March, 1874. Subsequently a decree was made by the Vice-Chancellor, and affirmed by the Court of Appeal, rescinding the contract, and ordering repayment of the £65,000; and a declaration was added, that the plaintiff company should be at liberty to prove in the sequestration suit in Scotland for the £65,000 (5 Ch. D., 394).

Founding on this decree the company lodged another claim with the trustee in Scotland. Again the trustee rejected the claim; and again a condescendence was made up. The company this time put their claim upon the allegations contained in the bill in chancery as finally amended on the 3d of March, 1874. The trustee relied on the plea of *res judicata*:

Held (affirming the decision of the court below), that the plea of *res judicata* prevailed, because (1) the new allegations of fraud in the amended bill in chancery did not constitute a new *medium concludendi*; (2) the alleged facts were within the knowledge of the claimants before the proof was adduced in the former action, and might have been inserted by amendment in their closed record in Scotland.

4. *Held*, also, that no question arose as to the validity, or examinability, of a foreign judgment.
5. *Per EARL CAIRNS, L.C.*: A party who has been unsuccessful cannot be allowed to reopen the litigation merely by saying, since the former litigation there is another fact, going exactly in the same direction with the fact stated before, and leading up to the same relief asked for before, but it being in addition to those facts, it ought now to be allowed to be the foundation of a new litigation, and he should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say

—I will show you that this is a fact which entirely changes the aspect of the case, and further I will show you that it was not and could not by reasonable diligence be obtained by me before. *Phosphate Sewage Co. v. Molleson*. 561

See TRUSTS AND TRUSTEES, 133, 149 *note*.

EVIDENCE.

See LIFE ESTATE, 787, 805 *note*.
PATENTS, 104, 106 *note*.

EXECUTORS AND ADMINISTRATORS.

1. A. C., being one of several executors, a debtor to his testator's estate in the sum of £20,130, and entitled to one-sixth of the said estate (estimated at £8,000) as legatee under the will, agreed with his co-executors, in accordance with the terms of the will and without objection from the parties interested, to set off the said £8,000 against the like amount of the debt then payable by him, at the same time paying about £1,000 in cash. Thereafter having become insolvent, A. C. agreed, by way of compromise with his creditors, including the said executors, that they should accept 5s. in the pound in full of their demands, secretly arranging with some of the said creditors to pay to them further sums if he should be in a position so to do, and subsequently paying to them, or some of them, further sums. For the purposes of the compromise the debt due to the testator's estate was treated by the executors as amounting to £19,808, thus in effect reviving the debt of £8,000 which had been previously discharged, and accepting in respect of it a composition of 5s. in the pound; and the executors also treated as revived A. C.'s right to one-sixth of the testator's estate.

In a suit brought by a legatee against the executors, all of whom proved the will, *held*, that the above agreement of set-off extinguished A. C.'s debt *pro tanto*, and had the same effect as if A. C. had paid £8,000 in cash. It also extinguished A. C.'s right under the bequest, unless it should turn out that

the one-sixth share exceeded the estimated £8,000, and subject to his liability to refund *pro tanto* in case the same should fall short of the estimated £8,000.

Held, also, that the agreement of compromise was a breach of trust and void as against the plaintiff, and that it was fraudulent as regards A. C. The secret arrangement, though not legally binding, was sufficient to vitiate the compromise.

2. *Held*, further, that whether or not a compromise by executors of a debt due from one of themselves will be excused and upheld if beneficial to the estate, the above compromise and the mode in which it was carried out as above were injurious to the estate and to the plaintiff, and that the plaintiff, in the absence of any consent or acquiescence by him, was not bound thereby.
3. *Held*, further, that A. C. was liable to the estate for the full amount of what would have been due and payable by him if the compromise had never been effected, and that the co-executors were severally liable for so much of the said amount as would or might at any time have come to their hands but for their wilful neglect and default.
4. It is not necessary to direct an inquiry previous to charging the defendants as for wilful neglect and default.
5. The executors having been directed by the will to sell the real estate, if they allowed one of their number to hold stores and buildings at less than a fair occupation rent, are chargeable with what would have been a fair occupation rent.
6. A house and premises having by the will been given to the widow for life without impeachment of waste, an inquiry was directed whether any charge for money expended thereon by the executors ought to be allowed or not, having regard to the circumstances under which the expenditure was made.
7. Interest on sums decreed allowed at 6 per cent. *De Cordova v. De Cordova*. 468, 485 *note*.
8. An order, under the modern practice, allowing an executor to continue the

proceedings in an action instituted by his testator, which order has been obtained by him after a judgment in favor of his testator, and after notice of an appeal against that judgment, is equivalent to the old order for revivor, and subjects him to the same liabilities. He becomes in effect a substantive party to the suit, and is personally liable to costs. *Boynton v. Boynton*. 513, 516 *note*.

EXTINGUISHMENT.

See ARBITRATION, 133.
PARTNERSHIP, 347, 386 *note*.

F.

FISHING.

- 1 In 1774 the Crown granted to L. a barony charter to lands almost continuous on both sides of a river in Inverness-shire, included were older baronies containing express grants of salmon fishing to parts of the river, some above and some below certain falls, also an ancient barony grant giving the fishing on the Water of Forne, which was alleged to be the old name of the whole river from its source to the sea. From time immemorial L. had exercised his possession, up to 1862, taking all the fish in the whole river by means of close cruives, just below the falls, which stretched right across the river, and which were narrower than then allowed by law. Above the falls he asserted his right (a) by occasionally fishing there; (b) by during spawning season having watchers; (c) by taking his tenants in their leases bound to protect the fishing, and prevent all others from fishing. All which he had done for a period much longer than forty years. Since 1862, when close cruives were abolished, he had regularly fished above the falls with net and coble.

Neither the Crown nor any one else had ever objected to L.'s entire possession of the whole salmon fishing in the river. The Crown now, while ad-

mitting L.'s right to the salmon fishing below the falls to be incontestible, claimed, *de jure coronæ*, all the fishing above the falls:

Held, affirming the decision of the court below, that the river here was a *unum quid*—one continuous and connected subject—and that L.'s entire control and enjoyment of the whole profit of the fish in the whole river, for a time far beyond the period of prescription, coupled with his titles, gave him the right to the salmon fishing within the limits and *ex adverso* his barony lands wherever situated:

2. *Held*, also, that this decision was without prejudice to any right of the Crown or its grantees to the salmon fishing *ex adverso* the ancient barony lands of C., which were lands on the banks of the above mentioned river intermixed with L.'s barony lands.
3. *See* Lord Blackburn's opinion (p. 311) as to the extent of a grant to take fish by yairs or cruives. *Lord Advocate v. Lovat*. 675

FOOD.

See FRAUD, 12, 26 *note*.

FOREIGN GOVERNMENT.

See INTERNATIONAL LAW, 673.

FOREIGN JUDGMENT.

See ESTOPPEL, 561.

FORMER ADJUDICATION.

See DAMAGES, 86.

FORMER SUIT.

See ESTOPPEL, 561.

FRAUD.

1. A man may be morally, and, under the terms of an act of Parliament, legally culpable, and yet his conduct may not give any right of action to a private individual who suffers injury thereby.
2. A breach of a statutory duty may not constitute the foundation for a private right of action.
3. A statement that the purchaser of an article must take it "with all faults," and that the vendor will give no warranty with it, and will refuse all future claim for compensation (where the vendor does nothing to conceal defect), relieves the vendor from all liability in respect of any defect in the article itself.
4. *Per THE LORD CHANCELLOR* (Earl Cairns): If such a statement was followed by a declaration of the vendor (who knew the reverse) that he believed the article to be free from objection, there might be ground for an action of deceit.
5. Where a statute prohibited persons from sending animals affected with a contagious disease to market, and inflicted penalties on any person so sending them, the act of sending them, if known to be so infected, was a public offence, but did not amount by implication to a representation that they were sound, and did not of itself raise, as between the vendor of the animals and the purchaser of them, any right on the part of the purchaser to claim damages in respect of an injury he had suffered in consequence of their purchase.
6. *Per LORD O'HAGAN*: The statute in such a case was passed for the benefit of the general public, and had nothing to do with the private bargains of individuals. *Ward v. Hobbs*. 12, 26 note.

See EXECUTORS AND ADMINISTRATORS, 468, 485 note.
 STOCKHOLDERS, 395, 675.

FRAUDS, STATUTE OF.

1. Where a court has to find a contract in a correspondence, and not in one

particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration.

2. Applying this rule, though the first two letters of a correspondence seemed to constitute a complete contract, the House, upon the whole of what had passed in letters and conversation, came to the conclusion that no concluded and complete contract had been established.

Per THE LORD CHANCELLOR: *Quære*, whether the addition, in a written document, of the words "subject to the title being approved by our solicitor," could affect a contract for the sale of land, otherwise complete in itself?

3. *Quære*, whether the proper meaning of such words is more than that the title offered is not to be accepted without investigation, and that objections made on such investigation would be subject to the decision of a legal tribunal?

4. *Per LORD SELBORNE*: The observation stated in *Jervis v. Berridge*, that "the Statute of Frauds is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties," affirmed. *Hussey v. Horn-Payne*. 210, 221 note.

See PLEADINGS, 31.

FREIGHT.

See RAILWAYS, 132.

FUNDS.

See TRUSTS AND TRUSTEES, 580.

G.

GIFT.

1. By a notarial deed, dated the 29th of May, 1866, the appellant gave an an-

nuitly to the respondent in trust for her five daughters, "*pour partie de leurs frais de toilette et autres petits besoins personnels*," the capital sum being thereby settled upon the daughters after their mother's death. The gift was made soon after the appellant came of age, and amounted to about one-hundredth part of her whole estate; and it was to be presumed from the circumstances that if she had contemplated having children she would still have made it :

Held, that, under these circumstances, by the law of Canada prior to the Civil Code (being that which existed in the jurisprudence of the Parliament of Paris before the Ordinance of 1731) the gift was not revocable on the birth of children.

2. The Ordinance of 1731 was not a mere declaration of existing law; and although it enacted that all gifts made by persons who had not children at the time of the donation "*de quelque valeur que les dites donations puissent être, et à quelque titre qu'elles aient été faites . . . demeureront révoquées de plein droit par la survenance d'un enfant légitime du donateur*," yet such enactment did not take effect in Canada *proprio vigore*, never having been registered in Canada.
3. Consequently the French law introduced into Canada by the Edict of 1663 remained unaffected by the Ordinance; and it was not proved and could not be presumed that such law became altered or modified in consequence of the jurisprudence of the province having adopted the rules contained in the Ordinance. *Symes v. Cuvillier*. 671

GOVERNOR, COLONIAL.

1. Trespass for seizing and detaining at Kingston in Jamaica a schooner of which the plaintiff was charterer, and which had, as alleged, put into the port of Kingston in distress and for repairs.
2. Plea in substance of privilege and to the jurisdiction, that the defendant was Captain-General and Governor-in-Chief of the Island of Jamaica, that the acts complained of were done by him as governor of the island and in the exer-

cise of his reasonable discretion as such, and as acts of State.

The plea did not aver even generally that the seizure of the plaintiff's ship was an act which the defendant was empowered to do as governor, nor even that it was an act of State:

Held, that the judgment *respondent ouster* was right and must be affirmed.

3. The governor of a colony (in ordinary cases) cannot be regarded as a viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission and limited to the powers thereby expressly or impliedly intrusted to him. It is within the province of municipal courts to determine whether an act of power done by a governor is within the limits of his authority and therefore an act of State.
4. *Quære*, how far a governor when acting within the limits of his authority, but mistakenly, is protected. *Musgrave v. Fulido*. 643, 654 note.

GRANT.

See STATUTE, 641.

H.

HABITUAL DRUNKARD.

1. By the law of Jersey in order to place a man under "*curatelle*" the court must be satisfied not merely that he is prodigal or likely to mismanage his property, but that he is so by reason of his habitual intemperance in the matter of drink. To establish the intemperance the court must not merely have the evidence of relatives (*les électeurs*), but the presentment after examination of *les six principaux*. A similar procedure is adopted for the removal of the interdiction and the reinstatement of the party in his civil rights.
When the court is satisfied that the interdiction should be reversed as regards the person, it has no power to continue the "*curatelle*" as regards the property upon a mere suggestion that

it would be better and more expedient for the family so to do. *Ex parte Nicolle.* 726

HEALTH.

1. The Public Health (Scotland) Act, 1867, s. 89, suba. 4, provides, that, "The local authority may cause all existing public cisterns, pumps, wells, reservoirs, conduits, aqueducts, and works used for the gratuitous supply of water to the inhabitants to be continued, maintained, and plentifully supplied with water." A well situated on private ground, the water of which has been used for domestic purposes gratuitously by the inhabitants in the vicinity for the prescriptive period, is a public well within the meaning of this section; and the local authority can enter on the land and do all acts to the well for continuing and maintaining it, which the inhabitants might have done before. And this, notwithstanding that there may be a company with a vested right to supply the inhabitants with water.

2. Situated in one corner of a private field in the parish of Denny is a well. From the well to the entrance of the field a footpath leads, and from this entrance to the public road going through the village of Denny there is a cart road. The inhabitants of Denny had for the prescriptive period used the water of the well for domestic purposes, and had had the well, *inter alia*, cradled with stones at their own expense. Up to 1877 Denny was a mere village without any burghal territory. But in that year Denny, with the adjoining village of Dunipace, was constituted a police burgh under the provisions of 25 & 26 Vict. c. 101, and the police commissioners of the burgh then became the local authority under the Public Health (Scotland) Act, 1867 (30 & 31 Vict. c. 101).

In 1878 the commissioners, in their character as local authority, and under the authority of sub-sect. 4, sect. 89, of the last-mentioned statute, caused the well to be covered in with an iron plate, and placed therein a hand pump with the avowed object of keeping the well free from pollution. The proprietor of the field, alleging the well to be his private property, raised a process of interdict and suspension against

the local authority praying for removal of the cover and pump, &c.:

Held, affirming the decision of the court below, that the well was a public well within the meaning of the statute, and that the local authority, as representing the inhabitants, had not done anything in excess of their powers. *Smith v. Archibald.* 786

See FRAUD, 12, 26 note.

HIGHWAYS.

See ARBITRATION, 133.
NEGLIGENCE, 173, 185 note.

I.

ILLEGAL AGREEMENTS.

1. Agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and reasonable in relation to the objects of the contract; and also unless they are made upon a real and *bona fide* consideration.

2. Where the object of an agreement is to parcel out the stevedoring business of a particular port amongst the parties to it, and so to prevent competition, at least amongst themselves, and also, it may be, to keep up the price to be paid for the work:

Held, that such agreement is not invalid, if carried into effect by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade.

3. A provision that if a particular merchant named in the agreement should refuse to allow the stevedoring of any ship to be done by the party entitled to it under the agreement, and should require one of the other parties to do it, such party so required should give an equivalent to the party who lost the stevedoring, is not unreasonable either as regards the party entitled or as regards the merchant.

4. But a provision that in the case of ships passing out of the hands of merchants named in the contract into the hands of other merchants, who should not choose to employ the party entitled under the agreement, all the parties thereto are deprived of the work, cannot be justified. It is obviously detrimental to the public, is entirely beyond anything the legitimate interests of the parties required, and is utterly unprofitable and unnecessary, at least for any purpose which can be avowed. *Collins v. Locke*. 448, 468 note.
5. The plaintiff deposited with the defendant £200 to abide the event of a match between a horse of the plaintiff and another horse belonging to G.; but before the day fixed for the race, he gave notice to the defendant that he revoked the authority to pay over the money, and demanded the return of it:
Held, that the plaintiff was entitled to recover such deposit. The contract under which the money was deposited was one by way of wagering, and therefore null and void under the Colonial Act, 14 Vict. No. 9, s. 8 (which is in the same terms as Imperial Act, 8 & 9 Vict. c. 109, s. 18). It was not an agreement to contribute a sum of money within the meaning of the proviso contained in the said section; which proviso applies to contributions other than wagers.
6. Where a colonial legislature has passed an act in the same terms as an Imperial statute, and the latter has been authoritatively construed by a court of appeal in England, such construction should be adopted by the courts of the colony. *Trimble v. Hill*. 697, 701 note.
2. General average and salvage do not come within either the words or the object of the suing and laboring clause of a policy of marine assurance.
3. Salvage expenses are not assessed upon the *quantum meruit* principle, but on the general principle of maritime law, rewarding persons who by great, and perhaps dangerous, exertions bring in a ship, for which exertions, if not successful, nothing would have been paid.
4. The assured, who had not abandoned, but had elected to repair, after damage sustained from perils of the sea, was *held*, therefore, not entitled to recover under that clause the expenses of salvage.
5. But *held* that, up to the amount insured, he was entitled to recover the cost of repair, with the reduction of one-third new for old, even although the amount, calculated upon that principle, should exceed the amount that would be payable upon a total loss with benefit of salvage, and should equal the whole sum insured.
6. The ship *Crimea* was insured with the defendant for £1,200, being valued in the policy at £2,600. It encountered very bad weather, and was in danger of sinking; it was rescued by a steamer, which obtained from the Irish Court of Admiralty £800 as salvage money. The owner did not abandon, but elected to repair. The defendant's proportion of the repair expenses amounted (after the deduction of one third-new for old) to £1,200, the full sum he had insured, and he was held liable to that amount; but was held not to be liable to any part of the salvage expenses.
7. There were cross appeals. Neither party was completely successful. No costs were given. *Aitchison v. Lohre*. 520

ILLEGAL BUSINESS.

See JUSTIFICATION, 808.

INCOME.

See LIFE ESTATE, 810, 819 note.

INSURANCE, MARINE.

1. A policy of marine assurance is not a contract of mere indemnity.

INTEREST.

See EXECUTORS AND ADMINISTRATORS, 468.
LEGACIES, 69.

See LIENS, 1.

INTERNATIONAL LAW.

1. Where money has been subscribed by bondholders for a particular purpose (such as the construction of a railroad) and part of that money has been placed in the hands of trustees for the bondholders, the duty of such trustees being to pay portions of the money as portions of the intended railroad are constructed, if no such railroad nor any portion of it is constructed, and its construction becomes impracticable, the bondholders are entitled to demand from the trustees repayment of what remains in their hands.
2. Where there is a right dependent on the practicability of doing a certain work, the question of its practicability is not to be determined solely by physical or financial reasons, but conditions previously stipulated (especially where the interests and the rights of third parties are concerned) must be considered.
3. Thus, where a loan was raised to make a railroad in a foreign country, such loan being raised on the faith of a prospectus which set forth, as a security to the bondholders, the grant of a concession by the foreign government, in virtue of which the bondholders would have the benefit of the custom duties imposed by that government on goods passing along that railroad, and the foreign government, finding the railroad not made, revoked its concession, the loss of the security which the concession had afforded to the bondholders, entitled them to treat the scheme as a failure, and to demand the return of their subscriptions.
4. A foreign government granted a concession, on the terms of which a company was formed and a loan raised, and bondholders constituted. The government afterwards revoked the concession:
5. *Held*, that its right to do so could not be questioned in any legal proceedings in this country.
6. Directions as to the form of the decree and as to costs. *National, etc., v. Wilson*. 678

See ESTOPPEL, 561.

JURISDICTION, 809.
WILLS, 658.

J.

JOINT DEBTORS.

See PARTNERSHIP, 347, 386 *note*.

JURISDICTION.

1. In a suit in the Consular Court of Turkey brought by the respondent against the wife of the appellant, for a sale of a piece of land in Prinkipo, with the mill and bakery erected thereon, and for the payment of three-fourths of the proceeds of such sale into court; it appeared—

(1.) That the respondent was trustee in liquidation in respect of three-fourths share only in the beneficial interest in the said property, which share was subject to a mortgage; the appellant, who was no party to the suit, being entitled to the remaining one-fourth share unincumbered;

(2.) That the defendant, having been originally a Turkish subject, had been made ostensible owner and trustee of the said property, in order to satisfy or evade the law of Turkey; but had thereafter by her marriage with the appellant become a British subject.

The court thereupon ordered, with costs against the defendant, on the 18th of July, 1874, that the whole of the property should be sold, and the whole of the proceeds paid into court. In 1876, however, the respondent sold the three-fourths share thereof to C., as agent of the mortgagee, by private contract, and received the purchase-money thereof.

On the 27th of March and 18th of June, 1878, the court granted *ex parte* applications of the respondent that the defendant be ejected from the whole of the said property, with costs, and that the mill be closed. This was done and the seals of the court put upon it.

On the 17th and 28th of June, 1878, the court refused applications by the appellant first for a rule nisi to set aside the said orders, on the ground that he was owner of one-fourth share of the mill and sole owner of two ovens attached to the mill; that C. had paid for and obtained possession of his three-

fourths share; and that the respondent had ceased to have any interest in the said property. Second, for leave to appeal to Her Majesty in council against the order of the 17th of June.

Thereafter by a series of orders the court refused to set free the movable property so placed under seal at the mill, or to set free the said two ovens, refused to the appellant a rule nisi to that effect, and refused to suspend the proceedings and reopen the mill and ovens until security for damage be given, in the latter case directing the defendant, who was no party to the application, to pay the costs. A further order *ex parte* on the application of the respondent was made that exclusive possession of the mill, bakery, and ovens be given to C., and that the defendant remove certain movable property on filing an affidavit that the same belonged to her and her husband, and that he consented to such removal; in default whereof the court, in the first instance, ordered that the same should be sold, but subsequently discharged this order on the application of the respondent, and substituted for it an order that the respondent should be at liberty to remove the movable property not belonging to him, and the defendant pay the costs:

Held, that the appellant had unquestionably suffered grievous wrong by reason of these irregular proceedings made in a suit to which he was no party. The defendant could not be sued as trustee without joining her husband, and was not the representative of her husband *quoad* his beneficial interest in the property. The court could not compel a sale nor put a purchaser into possession of more than the three-fourths share (subject to the mortgage), which was vested in the respondent.

2. Having regard to the power of the Turkish authorities over the land, and to the fact that C. was not subject to the jurisdiction of the Consular Court, no order could be made directing restoration of possession or decreeing damages, but the orders appealed against were declared to have been irregularly and improperly made, and were set aside with costs. *Pitts v. La Fontaine*.

809

See ARBITRATION, 448.

JUSTIFICATION.

1. The "O.," a Portuguese vessel, was seized on the 5th of December, 1876, whilst lying at anchor in the harbor and port of F. in Sierra Leone, as liable to be forfeited for offences committed against the provisions of 5 Geo. 4, c. 113, and 36 & 37 Vict., c. 88 (the Slave Trade Act, 1873), but was subsequently released by the court on it appearing that she was not engaged in the slave trade, but was chartered and intended to carry free immigrants:

Held, on appeal, that the seizer was rightly condemned in costs and damages. Although certain articles on board (shackles, an extraordinary number of empty casks, an extraordinary quantity of rice and mats) are included among the equipments which are declared to be *prima facie* evidence of a vessel being engaged in the slave trade, both by the treaty between England and Portugal, carried into effect by 6 & 7 Vict., c. 53, and by the Slave Trade Act, 1873; yet the seizer having had the means from the surrounding circumstances and from the ship's papers of informing himself of the true character of the vessel, and the true condition of the men on board who were alleged to be slaves, had no reasonable grounds for the suspicion that the vessel was engaged in or fitted out for the purpose of the slave trade.

2. The obligation upon a seizer to justify the seizure under the Slave Trade Acts of a vessel plainly engaged in *bona fide* trade within a harbor is a very strict obligation.
3. A reasonable suspicion that the alleged slaves had been kidnapped on board with the object of carrying them as free laborers, and not of consigning them to slavery, would not have justified the seizure and detention of the vessel.
4. According to the true construction of the Portuguese treaties, the consent on the part of Portugal that certain articles mentioned in the first schedule to the Slave Trade Act, 1873, when found on board a Portuguese vessel, shall be considered a *prima facie* evidence of her being engaged in the slave trade relates only to vessels on the high seas, and does not extend to vessels in

a foreign port or foreign territorial waters. The 4th section, therefore, of the act cannot be extended to a Portuguese vessel lying in British waters. *Queen v. Casaca*. 808

See DEFAMATION, 166.

L.

LACHES.

See PLEADINGS, 31.

LANDLORD AND TENANT.

See LIMITATIONS, STATUTE OF, 225.
MINES, 335, 346 *note*.

LEASE.

See LIMITATIONS, STATUTE OF, 225.
MINES, 335, 346 *note*.

LEGACIES.

1. Trustees were directed to sell heritable estates as soon after the testator's decease as practicable, and pay certain legacies. After a necessary litigation running over two years, the property was realized. On a question whether interest was payable from the testator's death, in accordance with the general rule in Scotland, or from the date of the sale:

Held, reversing the decision of the court below, that interest was due on the legacies from the testator's death. *Kirkpatrick v. Bedford*. 69

2. Who take as next of kin, and when; who are to be determined. *Mortimore v. Mortimore*. 329, 334 *note*.

See WILLS, 69.

LEX LOCI.

See JURISDICTION, 809.

LIBEL.

See DEFAMATION, 166.

LIENS.

1. The lien of a broker upon policies of insurance which he has effected, and on which he has paid the premiums, may be superseded by a special arrangement or contract, or by his particular mode of dealing with the parties for whom he has effected them. But where he has merely agreed to state monthly accounts and to receive monthly payments, but has never delivered up the policies until after actual payment made to him, his general right of lien is not superseded in any way by this special arrangement. And this is so though he has effected the policies through an intermediary, whom he knew to be an intermediary and not the principal, and who has received payment from the principal, but who has not paid the broker. *Fisher v. Smith*. 1

See BANKER'S LIEN, 312, 324 *note*.

LIFE ESTATE.

1. The heir in possession of an entailed estate in Scotland petitioned under the statutes for disentail. The first heir substitute gave his consent, but the second and third refused. In valuing the interest of the second and third heirs substitute, under the 5th section of the Entail Amendment (Scotland) Act, 1875, the questions arose (1) whether the probable duration of the life of the first heir substitute should be taken from the tables on the basis of his actual age, or whether his actual state of health should be ascertained by inquiry; he refusing to be medically examined, and the second and third heirs alleging that he had suffered from ail-

ments which tended to reduce the probable duration of his life greatly below the average of persons of his age. And (2) whether, there being only one other heir in the entail existing, the second and third heirs' chance of succeeding to the fee simple by surviving all the other heirs of entail should be taken into account:

Held, reversing the decision of the court below, (1) that all the facts tending to reduce the first heir's life below the average were relevant and should be taken into consideration; and (2) that the chance of succeeding to the fee simple ought to be valued. *McDonald v. McDonald*. 787, 805 note.

2. A testator appointed his wife and two other persons his trustees and executors—he empowered his trustees to make grants of his real estate in fee, or otherwise to sell his real and personal estate, and to stand possessed of the money arising therefrom in trust to invest the same, and set apart a sufficient portion of such investments as will produce the annuity of £1,200, “which I bequeath to my wife for her life,” payable on the usual quarter days, “the first payment to be made on the first of such days as shall happen after my decease, such annuity in case of my wife's second marriage, to be reduced to the annual sum of £150,” and subject to such investment to set apart £5,000 for his daughter Z. “As to the entire residue of my trust estate, and as to that part set apart in favor of my wife, and as to such part thereof as shall be no longer required to be set apart in consequence of her second marriage” in trust for three grandchildren:

Held, affirming the decision of the Court of Appeal, that this was the bequest of an annuity, and of an annuity not so restricted as to make it payable exclusively out of the income of a particular fund arising during the widow's lifetime. While the property remained unconverted (as might be the case during the whole of her life), the annuity was a charge on the whole income of the estate. The fund not being sufficient to produce the £1,200 a year, the deficiency was to be made good out of the corpus. *Carmichael v. Gee*. 810, 819 note.

See EXECUTORS AND ADMINISTRATORS, 468.

LIMITATIONS, STATUTE OF.

1. An eleemosynary corporation is within the meaning and operation of 18 Eliz. c. 10.
2. A lease, of land belonging to such a corporation, not in conformity with the provisions of the third section of that statute, is therefore absolutely void.
3. The governors of Magdalen Hospital (created a corporation, for certain charitable purposes, by the 9 Geo. 3, c. 81) made, in 1783, a lease of certain land of the hospital for ninety-nine years, at the rent of “one peppercorn (if lawfully demanded).” The only covenants, on the part of the lessee, were to indemnify the governors from all taxes, &c., during the term, and to surrender the premises at its end; and, on the part of the governors, for quiet enjoyment. No act had been done until now to avoid the lease, or to interfere with the persons holding the land. In July, 1876, the governors brought an action in chancery to recover possession of the land thus leased:

Held, that the lease was absolutely void within the provisions of the statute 18 Eliz. c. 10. That consequently the right of the governors to re-enter on the land existed from the moment of the execution of the lease, and that right not having been sought to be enforced till now, was barred by the Statute of Limitations, 3 & 4 Wm. 4, c. 27, s. 2.

4. *Per LORD SELBORNE*: If any rent, however small, had been reserved and received, it would have created the legal relation of a tenancy from year to year, and the Statute of Limitations could not have run. *Magdalen Hospital v. Knotts*. 225
5. When defence of may be raised by demurrer. *Dawkins v. Lord Penrhyn*. 31

LUNATIC.

See HABITUAL DRUNKARD, 726.

M.**MALICIOUS PROSECUTION.**

See PRINCIPAL AND AGENT, 187, 207 note.

MANDATORY.

See STATUTES, 674 and note.

MERGER.

See PARTNERSHIP, 347, 385 note.

MILITARY AUTHORITY.

See GOVERNOR, COLONIAL, 643, 644 note.

MINES.

1. The Crown is not entitled to the clay and sand in the customary estates of inheritance in the Isle of Man.
2. By the laws and customs of the Isle, the owners of customary estates of inheritance in customary tenements of Lord's lands have from time immemorial without the license of Her Majesty or her predecessors, Lords of the Isle, as of right dug, raised, and got the clay and sand therein, and have removed and used the clay for manuring their own and other lands, and for other purposes, and have converted it into bricks and tiles for sale. There is nothing in the history of the title to the Lordship or Manor of Man, and of the customary tenures, from which it is necessarily to be inferred that the above custom could not have had a legal origin; and it may be presumed from the existence of the custom, if nothing to the contrary appears, that it grew up with the tenures as one of their customary incidents.
3. The saving clause in the Act of Settlement does not involve a negation of the

custom nor override it: *Held*, that the word "minerals" in that clause did not include clay and sand. *Attorney-General v. Mylchreest*. 209

4. A termor of land, with no grant of a power to work quarries on the land, cannot open any in order to work them; but if the quarries have been worked before the commencement of the term, he may continue the working.
5. The owner of land demised it in 1802, by way of mortgage, for a term of 500 years at a peppercorn rent. A quarry, called the lower quarry, appeared to have been then open on the land, and had been worked by the mortgagor. In 1820, the mortgagee foreclosed the equity of redemption, and took possession of the property, and worked not only the lower quarry, but another, which received the name of the upper quarry. In 1873 the plaintiff, the reversioner of the term of 500 years, having, not long before, become acquainted with the fact that he was the reversioner, filed a bill to restrain the termor from working the quarries and for an account. At the trial the great dispute of fact was as to the time when the upper quarry had been opened. Vice-Chancellor Hall had thought that it was not shown to have been opened in the time of the mortgagor, and so granted, as to that, an injunction and account. The Court of Appeal came to a different conclusion on the evidence and dismissed the plaintiff's bill. On appeal to this House the decision of the Court of Appeal was upheld.
6. Where the lease of a quarry reserves, not the payment of a fixed sum by way of rent, but a share of the profits of the quarry, it is to be treated as opened for purposes of commerce.
7. The consideration of the facts and circumstances of a case must determine on whom the *onus* lies of showing when a mine or quarry was first opened for working.
8. A mine or quarry opened by the owner of the inheritance, while he was still in actual possession, even though after the date of the mortgage, will enure for the benefit of the mortgagee.

9. *Per LORD SELBORNE*: Where a mine or quarry has been opened for a restricted or definite purpose, as to obtain fuel, or the means of repairing a particular tenement on the estate, that would not give a tenant for life, or other owner of an estate impeachable for waste, the right to work it for commercial profit. But when a mine or quarry is once open, so that the owner of an estate impeachable for waste, may work it, the sinking of a new pit on the same vein, or the breaking ground in a new place on the same rock, is not, *necessarily*, the opening of a new mine or a new quarry. *Elias v. Snowden, etc.* 835, 346 *note*.

See CONFUSION, 622, 688 note.

MINGLING FUNDS.

See TRUSTS AND TRUSTEES, 580.

MISTAKE.

See TRUSTS AND TRUSTEES, 133, 149 note.

MIXING FUNDS.

See TRUSTS AND TRUSTEES, 580.

MORTGAGE.

1. Although a mortgagor is not entitled to a decree for redemption on a bill which impeaches the mortgage securities and contains no prayer for redemption; yet such rule does not apply where the issues disclosed by the pleadings are not merely mortgage or no mortgage, but whether the defendant by means of his acts subsequent to the impeached mortgage had ceased to be mortgagee and had become absolute owner, and also whether the mortgagee's advances on the footing of the mortgage had not been more than satisfied by his receipts, the bill praying

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55

for an account, and offering to allow to the mortgagee all just credits.

2. A purchase by a mortgagee of mortgaged property, sold either under the power of sale or in execution of a decree against the mortgagor company (obtained collusively between the mortgagee and the directors) does not operate to vest an absolute title in the mortgagee.

3. Where the mortgagor is a registered owner of leasehold estate in Victoria (under Transfer of Land Statute), and the mortgage is made and registered under sect. 88 and following sections, so that the only way in which the mortgagee can extinguish the rights of the mortgagor is by foreclosure under 31 Vict., No. 317, or sale under sects. 84, 85, and 87 of the Transfer of Land Statute; then whether a sale of such leasehold estate is made by the mortgagee under the statutory power of sale, or as absolute owner, no interest therein passes to the purchaser until registration: see ss. 42 and 87.

4. A mortgagee is accountable, not merely for his actual receipts whilst in possession of the mortgaged property, but also for whatever is received by those to whom he transfers possession under an arrangement inoperative to transfer title, and in derogation of the rights of the mortgagor.

5. A mortgagee in possession is not chargeable with interest on his receipts if, when he took possession, an arrear of interest was due to him, unless by setting up a title adverse to the mortgagor he has lost the immunities of an ordinary mortgagee.

6. A mortgagee is chargeable with the full value of the mortgaged property sold if, from want of due care and diligence, it has been sold at an under value.

7. A mortgagee who in a redemption suit sets up and fails to prove an absolute title to the mortgaged property, and is then found to have been, at the date of suit, overpaid as mortgagee, will not only not be allowed his costs of suit but may have costs given against him. *National, etc., v. United, etc.* 291,

810 *note*.

MORTGAGE FORECLOSURE.

See MORTGAGE, 291, 310 *note*.

MUNICIPAL CORPORATIONS.

See NEGLIGENCE, 173, 185 *note*.

MUSIC.

See COPYRIGHT, 493.

N.

NAVIGABLE RIVER.

1. Parties holding barony titles to lands situated on both sides of the Clyde, a navigable tidal river, claimed, as against the Crown and the Clyde Navigation trustees, that the foreshores *ex adverso* their lands belonged in property to them, subject to such rights of navigation or other rights which the public and the Clyde trustees might have over the same. The barony titles contained no express grant of foreshore, nor did they contain any specific boundaries which could be held to include the foreshore. The parties rested their claim on the grounds (1) that the barony titles alone gave them the property; (2) that coupled with their titles they had exercised from time immemorial acts of possession over the foreshore:

Held, affirming the decision of the court below, that the acts of possession for the prescriptive period having been proved, and following on barony titles to lands so situated, they constituted a right of property in the foreshore.

2. *Held*, also, that in this case it was not necessary to decide the question whether a barony title to lands so situated, which does not specify the exact boundary of the lands or contain any express grant of foreshore, could alone give a right of property in the foreshore.

3. See Lord Blackburn's opinion (p. 791), as to the weight of each act of possession as evidence. *Lord Advocates v. Lord Blantyre*. 533, 559 *note*.

4. In an action for damages and to obtain the demolition of a bridge constructed by the Corporation of Quebec across the Little River St. Charles, on the ground that the bridge obstructed the navigation of the river and thereby caused damage to the plaintiff as the owner of riparian land; it appeared that another bridge existed a short distance higher up the river, that the river was tidal beyond the higher bridge, and navigable for boats, flats, and rafts, and that it was possible at exceptionally high tides to float barges as far as the higher bridge, but that the difficulties and risks which from natural causes attended the navigation of craft of this description were so great that the river in its present state did not admit of their use in a practicable and profitable manner; that the small boats, flats, and rafts, could be navigated as before, unobstructed by the bridge, although masted barges could not pass it without lowering their masts; that the plaintiff's land was situated between the two bridges and was used as a farm, but was not proved to have been depreciated in value by reason of the bridge complained of and that the plaintiff was not proved to have sustained damage from actual interruption of traffic.

Held, that although there may be "*droit d'accès et de sortie*," belonging, according to French law as it prevails in Quebec, to riparian land as to a house in a street which, if interfered with, would at once give the proprietor a right of action; yet this right is confined to what it is expressed to be, "*accès*," or the power of getting from the water-way to and upon the land (and the converse) in a free and uninterrupted manner; that such right had not on the evidence been violated; and that supposing the bridge complained of to cause some obstruction to the navigation, the action could not be maintained in respect of it without proof of actual and special damage.

5. Whether an obstruction amounts to an interference with a riparian proprietor's access to his frontage, which is a private right by English as by

French law, is a question of fact to be determined by the circumstances of each particular case.

6. According to French law the test of the navigability of a river is its possible use for transport in some practical and profitable manner. *Bell v. Quebec*. 642

See FISHING, 675.

NEGLIGENCE.

- 1 The municipality of B., incorporated under New South Wales Acts, No. 18 of 1858 and No. 12 of 1867, and having thereunder the care, construction, and management of the roads and streets within their municipality, constructed therein a barrel drain into which ran an open drain, the brickwork of which having broken away, and not having been repaired, a hole was caused, into which the plaintiff's horse fell, carrying the plaintiff with him, crushing the plaintiff's leg against one side of the hole, and causing a compound fracture of the leg.

In an action claiming damages against the municipality (a) for negligence in constructing the street, (b) for negligence in keeping and maintaining the street, and not repairing the drain, gutter, or sewer in the said street (plea, the general issue) the Chief Justice directed the jury that the defendants under their act of incorporation were not liable for the result of any mere nonfeasance; that if they thought fit to construct a sewer, and did the work in so negligent a manner as to bring about the accident, they were liable for that misfeasance; but if they constructed the sewer properly in the first instance and it became defective afterwards they were not bound to repair it; and further, that if the defective state in which the drain was arose from the operation of the weather or wear and tear, it having been properly constructed originally, they were not liable. Verdict for defendants:

Held, on motion for a new trial, that as regards (b) there was misdirection. The barrel drain was not only made by the defendants, but the sole control and management of it were by the stat-

ute vested in them. By reason of their construction of that drain and their neglect to repair it, whereby, as an indirect but natural consequence the dangerous hole was formed, which was left open and unfenced, they caused a nuisance in the highway for which, whatever their statutory obligation to repair may have been, they were liable to an indictment, and also to an action by the plaintiff who had sustained direct and particular damage from their breach of duty. *Bathurst v. McPherson*. 173, 185 note.

See ADMIRALTY, 444.

EXECUTORS AND ADMINISTRATORS, 468; 485 note.

FRAUD, 12, 26 note.

NUISANCE.

See FRAUD, 12, 26 note.

NAVIGABLE RIVERS, 642.

NEGLIGENCE, 173, 185 note.

NEW TRIAL.

See DAMAGES, 727, 736 note.

NEXT OF KIN.

See WILLS, 329, 334 note.

O.

OBSTRUCTION.

See NAVIGABLE RIVERS, 642.

P.

PARTIES.

See APPEAL, 517 and note.

PARTIES IN INTEREST.

See *APPEAL*, 517 and *note*.

PARTNERSHIP.

1. There is no settled rule of equity that a contract which is in terms joint, and would be so construed at law, is to be treated in equity as joint and several.
2. An action, and a judgment against two persons who had borrowed money from the plaintiffs (though the judgment is unsatisfied), constitute a bar to another action brought by the same plaintiffs against a third person, who is afterwards discovered to have been really interested, as a partner, with the two debtors in the business for the purposes of which the money had been borrowed. (*King v. Hoare* adopted. *Diss.* Lord Penzance.)
3. This result did not depend on the doctrine of election.
4. *Seemle, per THE LORD CHANCELLOR* (Earl Cairns): If the case was considered as one of agent and undisclosed principal there could be no doubt about it.
5. K. had, under a written arrangement between himself and W. & M., made large advances to them in respect of certain speculations in iron. W. & M. fell into difficulties. K. brought an action against them to recover the debt, and obtained judgment. This judgment remained unsatisfied. W. & M., who resided in Scotland, became bankrupt there, and K. put in his claim under the Scotch sequestration, and recovered a small dividend. K. then discovered that H. had been associated as a partner in the speculations in iron, and brought an action against him as having been jointly liable with W. & M. in respect of the advances:

Held, that the action against H. was not maintainable, the contract having passed into a judgment. *Diss.* Lord Penzance, on the ground that the objection to K.'s title to recover was merely one of technical procedure at law, and that since the Judicature Act, 1873, the rule of equity had, as to such

a matter, superseded the rule of law, and the rule in equity admitted of this proceeding against H. the newly discovered partner.

6. The expression that partnership debts were treated in equity as joint and several explained. *Kendall v. Hamilton*. 347, 385 *note*.

See *STOCKHOLDERS*.

PATENTS.

1. In all cases where the utility of a patent has not been tested by actual employment the question to be considered is, whether the evidence is sufficient to rebut the presumption arising from its non-use that the invention is one of no practical utility.
2. Application for a prolongation of the term granted after strong and unanswered evidence of utility, though the patent had not been used in England during the whole of the term. On grounds of public policy the condition was annexed that the government and all contractors employed by the government should be at liberty to use the invention.
3. It is sufficient, prior to tendering evidence of instances of anticipation, to state the grounds of objection to the extension of letters patent without stating all the particulars of those objections. *Matter of Ball's Patent*. 104, 106 *note*.

PEACE, BILL OF.

See *QUILA TIME*, 103.

PENALTIES.

See *FRAUD*, 12, 26 *note*.

PERFORMANCE.

See *ARBITRATION*, 448.

PLEA.

See PLEADINGS, 738.

PLEADINGS.

1. To a declaration alleging a breach of an agreement therein set forth, and consequent damage to the plaintiffs, it was pleaded that a certain agreement had been come to between plaintiffs and defendants after disputes had arisen. The plea did not in terms admit or deny the alleged breach; nor did it in terms state that the agreement pleaded had been accepted by the parties in accord and satisfaction of the causes of action alleged in the declaration:

Held, on demurrer, reversing the judgment of the court below, that such plea was bad. It could not be assumed that an agreement, the defendants' version of which was set out in the plea, had been accepted in accord and satisfaction. *Barclay v. Bank New South Wales.* 738

2. D. claimed, under a will executed in 1779, a certain estate, and the mesne profits accruing from the date when his father's title under that will first arose. The statement of claim itself set forth dates which showed his grandfather's title to have first arisen in 1840, and his father's title, on the death of the grandfather, in 1852. His father died in 1864, and he alleged that he himself first knew of his own title in February, 1875. He asserted the existence of an express trust under the will. The defendant put in a demurrer alleging that "the statement of claim was bad in law," denying that there was a trust so as to defeat the estates limited over on the death of the first tenant in tail without issue male, and it concluded with these words, "and on other grounds sufficient in law to sustain this demurrer":

Held, that this last sentence was sufficient to raise the defence of the Statute of Limitations.

3. There is a distinction between the Statute of Limitations and the Statute of Frauds. The latter must be pleaded. The title to the estate, not the mere

right to proceed for its recovery, is affected by the former. If the plaintiff's statement of claim shows, on the face of it, that the time within which a title to land must be asserted has gone by, the defence of the Statute of Limitations may be raised on demurrer.

4. That defence was so raised without any distinct reference to the statute itself, and was *held* to be sufficient. *Dawkins v. Lord Penrhyn.* 31

See PATENTS, 104, 106 *note*.

PRESUMPTION.

See PRINCIPAL AND AGENT, 187, 207 *note*.
WATER AND WATERCOURSES, 91.

PRINCIPAL AND AGENT.

1. In an action for a malicious prosecution against an incorporated banking company, the jury found that the same had been authorized on behalf of the bank by W., the acting manager, and were directed by the judge that it was to be inferred from W.'s position as manager that he had sufficient power under the circumstances for directing a prosecution.

A rule nisi to enter a nonsuit or for new trial was discharged:

Held, on appeal, that assuming the prosecution to have been authorized by W., the direction to the jury to the effect that it was to be inferred from W.'s position that he had authority to direct the prosecution was on the evidence incorrect.

2. The arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and therefore not within the ordinary scope of a bank manager's authority. Evidence accordingly is required to show that such arrest or prosecution is within the scope of the duties and class of acts such manager is authorized to perform. That authority may be general, or it may be special and derived from the exigency of the particular occasion on which it is exercised. In

the former case it is enough to show commonly that the agent was acting in what he did on behalf of the principal; but in the latter case evidence must be given of a state of facts which shows that such exigency is present, or from which it might reasonably be supposed to be present. *Bank, etc. v. Orston*. 187, 207 note.

See BANKRUPTCY, 108.
PARTNERSHIP, 847, 885 note.

PUBLIC HEALTH.

See HEALTH, 786.

Q.

QUIA TIMET.

1. The object of a possessory "action on disturbance" within the meaning of and governed by sects. 946, 947, and 948 of Civil Procedure Code of Lower Canada must be definite and certain, and if a piece of land, must be capable of being distinguished by known if not visible metes and bounds, or by some description within sect. 52 of the same code. The possession to be proved must be *une possession annale*, and also a possession capable of being the foundation of a title by prescription, continuous and uninterrupted, peaceable, public, unequivocal, and "*à titre de propriétaire*."

Held in this case that the plaintiffs had failed to prove such a possession of the land in question as was sufficient to maintain a possessory action. *De Gaspe v. Beauséjour*. 103

R.

RAILWAYS.

1. A company obtained an act (8 & 9 Vict. c. clxix), authorizing it to construct a railway and to demand tolls

for the conveyance of passengers and goods thereon. The charge for the conveyance of goods was generally thus expressed, "per ton per mile not exceeding," &c. One clause provided that "for articles or persons conveyed on the railway for a less distance than four miles" there might be, "in addition to the prescribed tolls for conveyance, a reasonable charge for the expense of stopping, loading, and unloading." No publication of this charge in the form of "a toll" had been made upon the toll-board:

Held, that this "charge" for stopping was not properly a "toll," and that the non-publication of it on the toll-board in the form required by the Railways Clauses Consolidation Act, 1845, ss. 93 and 95, did not prevent the company from demanding it. The judgment of the court below was on this point affirmed.

2. The 105th clause granted tolls for "a fraction of a mile beyond four miles," &c.; the company claimed such tolls when the whole distance traversed was less than four miles. The Court of Appeal, consisting of Lords Justices James, Mellish, and Baggallay, had been divided in opinion on this point; Lords Justices James and Baggallay holding that on the true construction of the words in the clauses of the act such a charge was justifiable, Lord Justice Mellish holding that it could not be made. On appeal to this House there was again a division of opinion.

THE LORD CHANCELLOR (Earl Cairns) and LORD SELBORNE were of opinion that the charge was, on the whole, warranted by the words of the act, and that the judgment of the court below must on this point also be affirmed.

LORD PENZANCE and LORD O'HAGAN, applying the principle that no charge could be imposed on the public but by the clearly expressed intention of the Legislature, *held* that in this case the Legislature had not clearly expressed an intention, nor had intended, to authorize such a charge.

The judgment of the court below stood affirmed. No costs were given.

3. Reasons for not giving costs in such a case, as suggested in *Anderson v. Morice* explained. *Price v. Monmouthshire, etc.* 132

RAILWAY COMPANIES.

See EMINENT DOMAIN, 60.
PRINCIPAL AND AGENT, 187, 207 *note*.

RENTS AND PROFITS.

See EXECUTORS AND ADMINISTRATORS, 468,
485 *note*.
MORTGAGE, 291, 310 *note*.

RES ADJUDICATA.

See ESTOPPEL, 561.

RESCISSION.

See STOCKHOLDERS, 675,

RESTRAINT OF TRADE.

See ILLEGAL AGREEMENTS, 448, 468 *note*.

REVIVOR.

See EXECUTORS AND ADMINISTRATORS, 518,
516 *note*.

REVOCATION.

See GIFT, 671.
INTERNATIONAL LAW, 673.
TRUSTS AND TRUSTEES, 133, 149 *note*.
WILLS, 48, 63 *note*.

RIVERS.

See NAVIGABLE RIVERS, 583, 559 *note*, 642.

S.

SALE.

See FRAUD, 12, 26 *note*.

SETTLEMENT.

See EXECUTORS AND ADMINISTRATORS, 468,
485 *note*.
TRUSTS AND TRUSTEES, 133, 149 *note*.

SLANDER.

See DEFAMATION, 166.

SLAVE TRADE.

See JUSTIFICATION, 808.

SOVEREIGN.

See GOVERNOR, COLONIAL, 643, 654 *note*.
STATUTE, 641.

SPLITTING CAUSE OF ACTION.

See DAMAGES, 86.

STATUTE.

1. The proviso to sect. 31 of the Lands Act Amendment Act, 1875 (which regulates the application by a Crown lessee to purchase lands comprised within his lease), enacts:

"Provided also that no such application to purchase as aforesaid shall be made for more than one square mile within each block of five miles square out of each lease, or a proportionate quantity out of any holding of less area":

Held, that according to the true construction thereof, a Crown lessee has a right of pre-emption of such square mile if it forms part of a block which is equivalent to an area of five miles square, i.e., which contains an area of twenty-five square miles, irrespective of whether such block forms or contains

a geometrical figure five miles-square.
Robertson v. Day. 641

2. The words in a statute "it shall be lawful" of themselves merely make that legal and possible which there would, otherwise, be no right or authority to do. Their natural meaning is permissive and enabling only.
3. But there may be circumstances which may couple the power with a duty to exercise it. It lies upon those who call for the exercise of the power to show that there is an obligation to exercise it.
4. The 3d section of the Church Discipline Act (3 & 4 Vict. c. 86), provides that in every case of any clerk in holy orders who may be charged with any offence against the Laws Ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or, if he shall think fit, of his own mere motion, to issue a commission under his hand and seal to certain persons for the purpose of making inquiry as to, the grounds of such charge or report:
Held, that this section gave the bishop complete discretion to issue or decline to issue such commission.
5. The act recites that the manner of proceeding in cases for the correction of clerks requires amendment. Its provisions therefore may be construed independently of the practice under the previously existing law.
6. *Per LORD BLACKBURN*: There is no duty cast on the bishop by the statute, unless perhaps a duty to hear and consider the application, which in this case he has performed.
7. Enabling words are always compulsory where they are words to effectuate a legal right. *Julius v. Carter.* 674.
and note.

See EMINENT DOMAIN, 745.

FRAUD, 12, 26 *note*.

INTERNATIONAL LAW, 673.

PLEADINGS, 31.

STOCKHOLDERS.

1. In 1850 shares in the City of Glasgow Bank, which was a company registered, but not formed under the Companies Act, 1862, were transferred into the names of A. and three others as trustees and executors of a deceased trustor. A. signed mandates to the bank authorizing the payment of dividends, sanctioned the purchase of additional bank stock, and signed the minutes of meetings of the trustees. On the voluntary winding-up of the company:
Held, affirming the decision of the court below, that A. was rightly put on the list of contributories.
2. Two surviving original trustees executed a deed assuming new trustees. Both new and old trustees passed an unanimous resolution to have stock standing in the names of the original trustees in the City of Glasgow Bank transferred into the names of the original and assumed trustees. A note of assumption, giving the names of all the assumed trustees, was made by the bank officials on the stock ledger following the account of the original trustees. All the trustees signed a minute of a meeting of the trustees, which stated that "Mr. Lang (one of them) tabled the scrip of the bank stock showing that the same had been transferred into the names of all the trustees original and assumed as directed at the previous meeting." At the winding-up of the company the names of the assumed trustees were placed on the list of contributories. In a petition for rectification:
Held, affirming the decision of the court below, that the assumed trustees, except one, a female trustee, who had been a minor, and unmarried at the date of the resolution to transfer, were properly on the list of contributories; and declared as to the sometime minor, that her name should *in hoc statu* be removed from the list, without prejudice to the right of the liquidators to place thereon the names of her husband and herself in her right. *Case of Bell and others.* 886
3. If directors in the fair and *bona fide* exercise of their powers under the company's contract, as managers of the company, and in circumstances which make it a reasonable act of

management, resolve not to record future transfers which may seriously affect and alter the liability of the partners, the resolution will be effectual, and the directors in declining to record the transfers cannot be held to be in default within the meaning of sect. 35 of the Companies Act, 1862.

4. Before the commencement of the winding-up, but after the stoppage, and after the publishing of a notice by the directors calling a special general meeting of the shareholders of the City of Glasgow Bank, for the purpose of passing a resolution to have the bank wound up by reason of its irretrievable insolvency; and after a resolution by the directors that they would not record any future transfers, one of four trustees whose names appeared as such on the bank register resigned his office of trusteeship under 24 & 25 Vict. c. 84, s. 1, with the consent of his co-trustees and the beneficiaries. A notarial copy of the resignation was sent the next day to the bank, but the directors refused to alter the register by affixing a note, or in any other way:

Held, affirming the decision of the court below, that the resignation was too late to exempt the trustee from personal liability.

5. *Per* EARL CAIENS, L.C.: The trustee's resignation of his trusteeship alone would not terminate his liability. He ceased to be a trustee; but it remained for him to terminate his liability in respect of the bank by a transfer, or something equivalent to a transfer, of his shares.
6. *Per* LORD SELBORNE: After the issuing to the shareholders and the public of a circular calling a meeting, with a view to the necessary resolution for a voluntary winding-up, it is too late for any shareholder to part with his shares, either to the copartnership itself or to any other person. *Mitchell's Case*. 386
7. In 1873 the names of four trustees were entered on the register of the City of Glasgow Bank as members. On the 2d of October, 1878, the bank stopped payment. On the 6th of October the directors issued a summons convening a general meeting of the shareholders to pass a resolution for voluntary wind-

ing-up. On the 18th of October the original trustees assumed new trustees; resigned their office of trust; and executed a transfer. The directors refused to alter the register:

Held, affirming the decision of the court below, that the original trustees were personally liable, their resignation being too late. *Rutherford's Case*. 387

8. A trustor under his settlement appointed three persons, A., B., and C., as his trustees, who were also to be his sole executors with his heritable and movable estate, which included City of Glasgow Bank stock. C. died, and the trustor executed a codicil appointing D. as trustee, and with the same powers as A. and B. The trustor having died in 1854, A., B. and D. accepted the trust; were confirmed executors, and were entered on the bank register as executors for the stock. D. sometimes signed the dividend warrants as "trustee," and once as "sole surviving trustee and executor." The bank suspended payment on the 2d of October, 1878, and on the 22d of October D. resigned his office of trustee:

Held, affirming the decision of the court below, that D. was personally liable, on the ground that more than twenty years before he had authorized the stock to be transferred into his name, and had ever since acted as a shareholder.

9. *Held*, also, the resignation was of no effect to escape liability.
10. *Per* EARL CAIENS, L.C.: An executor whose testator has held shares in a joint stock company has generally one of two courses open to him. He may have the shares transferred into his own name, and become to all intents and purposes a partner in the company. He may, on the other hand, not wish to have the shares transferred into his name, and he ought in that case to have a reasonable time allowed him to sell the shares, and to produce a purchaser who will take a transfer of them.
11. In any case where the bank transfers the shares into the name of the trustor's executor, this House would require to be satisfied that the transfer had been authorized by a distinct and intelli-

gent request on the part of the executor.

12. *Per* LORD SELBORNE: The case of trustees who take a transfer of shares in their names differs, in principle, from that of executors, who merely intimate their title as executors to a company, in order to claim and exercise the rights which belong to them as the legal representatives of their testator. . . . Trustees have not, in any proper sense of the word, a representative character, but executors have. . . . Having representative rights, it is impossible that they should not be entitled to produce the legal evidence of them to the company, for the purpose of having their title in some way recorded and recognized, without making themselves personally liable. *Buchan's Case*. 387

13. In 1855 stock in the City of Glasgow Bank was transferred to trustees by an ante-nuptial contract of marriage. The law agent made a declaration of the contents of the deed, and notified it to the bank, who placed all the names of the trustees on the register of shareholders, as trustees. The marriage contract was not signed by any of the trustees; but they all subscribed subsequently a transfer of railway stock from the wife as executrix of one Bogle to themselves; and in this transfer they were described as "trustees nominated under and by virtue of the said ante-nuptial contract of marriage." In 1856 A., one of the trustees, signed a dividend warrant; and shortly afterwards he left the neighborhood. On the death of the husband in 1868, it being necessary to expedite confirmation to his estate, A. refused to act any longer, and sent to the law agent a formal letter declining his office of trustee, it was accepted by the other trustees, but not regularly intimated to, or acted upon, by the bank. A.'s name remained on the register until the stoppage of the bank on the 2d of October, 1878:

Held, affirming the decision of the court below, that A.'s name was rightly on the list of contributories, his acceptance of the trust being clearly established by his actings, extending over a long period of years; and that his resignation had not the effect of

exempting him from personal liability. *Ker's Case*. 388

14. A., one of five trustees appointed under a marriage contract, signed with his co-trustees a note approving the purchase of stock in a joint stock banking company of unlimited liability. By the authority of the law agent of the trustees, acting on the note of approval, all the names of the trustees appeared in the transfers as accepting the stock, and in the register of members of the company. A. did not sign the transfers, but he signed a subsequent letter to the company authorizing the payment of dividends. The company was wound up, and A. and his co-trustees were placed on the list of contributories as personally and individually liable for calls. In a petition at the instance of A. for rectification of the register and list of contributories: *Held*, affirming the decision of the court below, that A. had authorized his name to be placed on the register. That the trustees were liable *in solidum* for the whole of the stock, and not *pro rata parte* for one-fifth part only. *Cunninghame v. Glasgow Bank*. 388

15. Since 1873 A. had appeared on the register of a joint stock banking company as the holder of £6,000 of stock. On the 2d of October, 1878, the bank stopped payment. On the 5th of October the directors issued circulars summoning an extraordinary general meeting to pass a resolution to wind up the company. On the 18th of October a report made by independent investigators was sent to all the shareholders, which showed that the insolvency of the company was of such an overwhelming character that large calls would have to be made to meet its liabilities. On the 21st of October A. raised an action for reduction of his contract to take stock, on the ground that he was induced to purchase by the fraudulent misrepresentation of the directors. The summons in this action was served on the company on the same day. On the 22d of October an extraordinary resolution to wind up the company voluntarily was passed. A. was put on the list of contributories. In a petition by A. for rectification of the register and list of contributories based on the action of the 21st of October:

Held, affirming the decision of the court below, that the rights of innocent third parties had intervened; and that A.'s action for reduction of his contract was too late to exempt him from liability. *Tennent v. Glasgow Bank.* 395

16. On the 28th and 30th of September, 1878, a shareholder in a joint stock banking company sold, through his broker in the usual course of business, on the Glasgow stock exchange, his shares for settling-day, the 16th of October. The name of the person in whose name the stock stood in the books of the company was not made known to the purchasers, nor were the shares marked by numbers, but the holders on the day of sale sent contract notes intimating the sale and purchase to their respective principals. On the 2d of October the company suspended payment, and the directors knew that its insolvency was irretrievable. On the 5th of October an extraordinary meeting of the company's shareholders was summoned by circular for the 22d, to pass a resolution to wind-up the company voluntarily, on account of its insolvency. On the 11th of October the seller was informed that the company had been the purchasers, they having the power to purchase their own stock by their articles of copartnership. On the 15th of October the company refused to prepare a transfer of the stock to themselves; and on the 18th they refused to register a unilateral deed of transfer which was delivered to them by a notary public. On the 19th the shareholder presented a petition for rectification of the bank's register by the deletion of his name therefrom. On the 22d of October the extraordinary resolution to wind up voluntarily was passed. The liquidators placed the shareholder's name on the list of contributories. In a question under sect. 35 of the Companies Act, 1862:

Held, affirming the decision of the court below, that it would have been improper for the directors under the circumstances to have registered the transfer on the 16th of October, and therefore that the shareholder's name was rightly included in the list of contributories.

17. *Held*, also, that it was unnecessary in this case to decide whether the contract of sale was null and void under the provisions of 30 Vict. c. 29. *Mitchell v. Glasgow Bank.* 404

18. For some years previous to 1878 A. and B. had carried on in partnership the business of law agents in Edinburgh. By contract of copartnership, executed in August and October, 1878, A. and B. on the narrative that the former partnership had ceased, agreed to continue the same, and to assume C. as a partner on the terms, *inter alia*, that the new firm should continue under the firm name of A. and B.; that the bank account should be kept in the name of the firm; and that A. and B. should supply the necessary capital required in equal proportions, either by holding bank stock in the name of the firm, or by advancing the requisite funds. Prior to the execution of this contract, but with a view to the arrangements of the new firm, £1,000 of stock of the City of Glasgow Bank, an unlimited joint stock company, was purchased by A. and B. who supplied the price in equal proportions. A transfer was taken in favor of A. & B., "and the survivor of them for behoof of the firm" of A. & B. A similar entry appeared in the register of members.

C. was not aware of the terms of the contract, or a party to the transfer. The bank stopped payment, and the liquidators placed A. & B. individually on the list of contributories as holders of £1,000 of stock as "trustee for the firm" of A. & B. In an application *inter alia* to vary the list by deleting the words "trustee for the firm" and to place A. & B. on the list as contributories each for a separate sum of £500:

Held, affirming the decision of the court below, that a trust was created for the benefit of the partnership, and that as trustees A. and B. were jointly and severally liable for all calls in respect of the £1,000 of stock. *Gillespie v. Glasgow Bank.* 411

19. One of the articles of association of a Scotch joint stock limited company enacted that "No transfer of any shares of the company's stock, either upon a sale, or in consequence of the bank-

ruptcy or insolvency of any shareholder, or in consequence of the marriage of any female shareholder, shall be valid or effectual without the consent of a majority of the other shareholders expressed in writing; but in the event of the other shareholders declining to consent to any such proposed transfer of shares in the company, they shall be bound to take such shares at the price offered in the case of a proposed sale, and at the market price of the day in the case of a proposed transfer for any other cause." Added subsequently by special resolution: "Unless such shares shall not at the time be fully paid up, and the reason for declining to consent be that the directors are not satisfied with the proposed transferee." Trustees entered upon the register were anxious in the discharge of their duty to dispose of their trust shares, which consisted of 100 £100 shares, fifty being fully paid up, and fifty on which £1 per share had been paid. After negotiations, the four directors by special minute approved of the purchase by three of themselves of these shares to be held in trust for the company. A transfer was executed in favor of the three directors "in trust for the company;" and their names were entered upon the register of members, with the same designation. The money paid for the shares came out of the funds of the company; and thereafter the selling trustees ceased to be treated as having any interest therein. At the next general meeting the purchase was approved of by a majority of the shareholders. There was no other transfer or transferees proposed. More than fifteen months after the transaction the company was wound up voluntarily, and calls were necessary to pay creditors. In an application by the liquidator substantially for rectification of the register, by substituting the names of the selling trustees for those of the three directors; it being admitted that all parties had acted with perfect good faith:

Held, affirming the decision of the court below, that the names of the three persons—the three directors—now appearing upon the register as holding these shares could not be disturbed; the transfer to them being valid and effectual, and the rights of creditors having intervened. *Cree v. Somervail*. 425

20. A person purchasing a chattel or goods, concerning which the vendor makes a fraudulent misrepresentation, may on finding out the fraud elect to retain the chattel or goods, and still have his action to recover any damage he has sustained. But the same principle does not apply to shares or stock in a joint stock company, for a person induced by the fraud of the agents of a joint stock company to become a partner in that company can bring no action for damages against the company whilst he remains in it: his only remedy is *restitutio in integrum*, and rescission of the contract; and if that becomes impossible—by the winding-up of the company or by any other means—his action for damages is irrelevant, and cannot be maintained.

21. H. bought from the City of Glasgow Bank, a copartnership registered under the Companies Act, 1862, £4,000 of its stock in February, 1877.

He was registered as a partner, received dividends and otherwise acted as a partner ever since. The bank went into liquidation in October, 1878, with immense liabilities; and H. was entered on the list of contributories, and paid calls. In December, 1878, H. raised an action against the liquidators, to recover damages in respect of the sum he had paid for the stock; the money he had already paid in calls; and the estimated amount of future calls. He founded his right to relief upon the ground of fraudulent misrepresentations made by the directors and other bank officials to him. He admitted that after the winding-up had commenced it was too late for him to have rescission of his contract, and *restitutio in integrum*:

Held, affirming the decision of the court below, that, even although the fraudulent misrepresentations might, if the bank had been a going concern, have entitled him to rescind his contract, rescission being now impossible, as decided by *Oakes v. Turquand* (Law Rep., 2 H. L., 325), and *Tennent v. City of Glasgow Bank* (4 App. Cas., 615), they afforded no ground for an action against the liquidators; therefore the action was irrelevant. *Houldsworth v. Glasgow Bank*. 675

See DIRECTORS, 236, 286 note.

T.

TAIL, ESTATE.

See WILLS, 746.

TENANT IN TAIL.

See TRUSTS AND TRUSTEES, 81.

TRESPASSER.

See JUSTIFICATION, 808.

TRUSTS AND TRUSTEES.

1. A testator devised his estates to his son and his heirs male "in the fullest trust and confidence" that he would not do, nor permit to be done, "any act in law or otherwise" to defeat the thereafter declared trusts and limitations of the estates, but that, on the contrary, he would do all in his power to effectuate them. He then declared how the estates were to go if the son died without issue of his body lawfully begotten, specifically devising one-fourth portion to D. The son having entered into possession of the devised estates, suffered a recovery :

Held, that the words of the will did not create a trust, and that the entail was barred by the recovery.

2. *Per* LORD PENZANCE : The right of a tenant in tail to enlarge his estate into a fee cannot be restricted by any expressions of a testator, the donor of the estate. *Dawkins v. Lord Penrhyn*. 81
3. A father, being desirous to disentail his estate, procured the consent of the next heir, his eldest son. The minute of agreement between them provided that the father should pay absolutely to the son £4,000; and secondly, should pay to trustees the further sum of £3,000, for the benefit of the son ; it being open to the father to limit the power and control of the son over the said £3,000, to such extent, and in such manner, as he should think proper ; "and in particular," to direct the trus-

tees to hold it for the son's behoof "in life-rent only, and for the issue of his body in fee, whom failing, to his nearest heirs and assignees."

Three months afterwards, a bond was executed by the father as security for the £3,000, in favor of the trustees "and for the ends, uses, and purposes, expressed in a declaration of trusts," of even date therewith. The deed of declaration restricted the son's interest to an alimentary life-rent ; and failing his issue, the fee was given to his aunt and her children. The son declared his acquiescence in the bond, and declaration of trusts, which were subsequently delivered to the trustees, who paid the income of the £3,000 to the son.

After the father's death, the son married ; and subsequently died, survived by his widow, but without issue. He left a deed by which he revoked the destination in the declaration of trusts in favor of his aunt and her children, and bequeathed the £3,000 to his widow :

Held, affirming the decision of the court below, that the deed of revocation was effectual, the destination in favor of the aunt and her children being purely of a testamentary nature ; and that no *jus quesitum tertio* had been created.

4. *Per* LORD SELBORNE : The son could not possibly be bound by any erroneous interpretation which the trust deed might have put upon the original contract, so as to substantially vary its operation and effect, either on the principle of estoppel, or any other, unless there were some new bargain, or new consideration. *Wightman v. Costine*. 133, 149 *note*.
5. In 1695 a trustor settled, in connection with Trinity Hospital, Edinburgh—a charity for the support of indigent and sick persons—a sum of money secured on bonds. The interest in perpetuity was to be employed in the maintenance in the hospital of twelve poor persons ; the preference to be given (1) to those of the trustor's kindred ; (2) to those of his name ; and (3) if these did not apply then to indigent persons generally. He appointed as the patrons the lord provost and town council of Edinburgh, and the ministers of the burgh present and to come. The lord provost, magistrates

and town council were governors of the hospital, and got control of the fund in 1700, and administered it as if part of the general charity funds of the hospital, mixing the interest with the general income of the hospital, and from the mixed income defrayed the expenses which they incurred for the whole charity, without making any distinction in the accounts.

6. The bonds of the settled sum were paid up in 1744 and 1753, and were subsequently, with other charity moneys lent to the city of Edinburgh; and on them a great loss occurred.

Other funds of the hospital had been invested in land in 1734, and that land had increased greatly in value. The ministers of the burgh never took any part in the administration of the fund. In a question whether the settled fund, on being ordered to be separated, was to participate in the present increased value of lands purchased since 1700; and whether the ministers had now a right to be joined in the administration:

Held, affirming the decision of the court below, that (1) the fund had been so inextricably mixed with the general charity funds, that it must be taken to have participated proportionally in the increased value of the hospital funds, and that in valuing the aggregate funds all lands purchased since 1700 must be valued and taken into account; (2) that notwithstanding the length of time during which a contrary practice had prevailed, the ministers should be joint administrators. *Provost v. Lord Advocate*. 580

See DIRECTORS, 236, 286 *note*.

EXECUTORS AND ADMINISTRATORS, 468, 485 *note*.

STOCKHOLDERS.

U.

ULTRA VIRES.

1. *Held*, that an award made under "The Railway Act, 1868," awarding to the respondent railway company as damages for expropriated land "the sum of \$35,013 *plus* \$100 per month from this date, payable on the first of each month until the said company shall have set

free the watercourse serving to drain the quarries adjacent to the expropriated land and constructed a culvert to protect the said watercourse," is invalid upon the face of it, in respect of the monthly payment directed, which is not rent, but in the nature of an assessment of damages payable *in futuro*, contingent on a future event and therefore uncertain; and also in respect of the direction to construct a culvert, which was not within the functions of the arbitrators.

2. Under the act it is not competent to the arbitrators to impose the payment of a rent or periodical sum at all. Their duty is, except when the parties expropriated fall within the description of "corporations or persons who cannot in common course of law sell or alienate the lands set out and ascertained," to fix as compensation such a gross sum or sums as would be capable of being paid or tendered at once to the parties entitled to the same under sub-sect. 27, or into court under sub-sect. 34 of sect. 9 of the act, in order to entitle the company to possession under the 27th, or to confirmation of title under the 34th and 35th sub-sections.

3. By a deed (16th of November, 1875) the respondent company, which had been originally incorporated under Quebec Act 32 Vict. c. 55, but which was subsequently declared a federal railway by Canadian Act 36 Vict. c. 82, and became subject to Canadian Railway Act, 1868, purported to transfer such federal railway with all its appurtenances and all its property, liabilities, rights, and powers to the Quebec Government, and agreed to dissolve itself as soon as such transfer should be perfected.

By Quebec Act 39 Vict. c. 2, such transfer was confirmed, the enterprise of the respondent company was combined with that of another company which had made a similar transfer to the government, the respondent company was dissolved, and its property vested in a new company with a new title and a different organization, which was thereby declared to be subject to provincial legislation:

Held, that both the deed and the enactment 39 Vict. c. 2, were invalid, and inoperative to affect the obligations of the company.

4. Such a transfer is *ultra vires* a railway company, by the law of the province of Quebec as defined by Art. 369 of the Civil Code; and by the special legislation affecting the respondent company, read in connection with the British North America Act, 1867, sect. 91 and sect. 92, sub-sect. 10, the same could not be validated to all intents and purposes by an act of the provincial legislature. An act of the Parliament of Canada was essential in order to give to such transfer full force and effect; whatever may have been the inchoate rights created thereby as between the parties thereto. *Bourgoin v. La Compagnie, etc.* 744
5. The doctrine of *ultra vires* as explained in *The Ashbury Railway Company v. Riche* is to be maintained, but is to be applied reasonably, so that whatever is fairly incidental to those things which the Legislature has authorized by an act of Parliament, ought not (unless expressly prohibited) to be held as *ultra vires*.
6. In an act of this kind granting special powers, what is not permitted is prohibited.
7. *Per* LORD WATSON: The test applied in the *Ashbury Case* to the powers of a joint stock company (limited), registered under the Companies Act, 1862, applies with equal force to the case of a railway company incorporated by act of Parliament.
8. An act of Parliament authorized a company to make a railway to T. and S. There were two other railway companies which were afterwards combined into one called the Great Eastern Railway Company. This latter company entered into a contract with the T. and S. Company, with which it was in connection in several respects, to supply it with rolling stock upon receiving a certain annual payment, and having certain other advantages. The contract was adopted by the shareholders of both companies. An action was brought against the Great Eastern Company, and an injunction asked for to restrain it from executing this contract. One of the acts relating to the two companies contained (cl. 14) the following provision: "The two companies may enter into agreements with

respect to the working, maintenance and management of the Extension railway [this was the T. and S. railway], or any part thereof, and of the railways of the two companies connected therewith [these were the two companies which had been incorporated under the name of the Great Eastern], and with respect to the apportionment of the traffic, and of the tolls, fares and charges for traffic on the extension railway, and the railways of the two companies, the appointment of a joint committee, or any other matters incidental to the carrying out the purposes of this act." The 15th clause of the act was in these words, "The directors of the T. and S. Company and the directors of the two companies, respectively, may (subject to the sanction of the shareholders) enter into any contracts or agreements for effecting all or any of the purposes of this act, or any objects incidental to the execution thereof, and every such contract or agreement may contain such covenants, clauses, powers, provisions, and conditions as may be mutually agreed upon between the parties thereto."

Held, that the contract of the G. E. Company to supply the T. and S. Company with rolling stock was not *ultra vires*, but was warranted by the words of these sections of the act. *Attorney General v. Great Eastern Railway.* 768, 788 *nota*.

See BANKRUPTCY, 103.

W.

WAGERS.

See ILLEGAL AGREEMENTS, 697, 701 *nota*.

WARRANTY.

See FRAUD, 12, 26 *nota*.

WATER AND WATERCOURSES.

1. The right to the water of a river flowing in a natural channel through a

man's land, and the right to water flowing to it through an artificial water-course constructed on his neighbor's land, do not rest on the same principle. In the former case each successive riparian proprietor is *prima facie* entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin.

2. *Held*, in this case, that the plaintiff's legal right to the enjoyment of water overflowing from an artificial reservoir through an artificial watercourse on his neighbor's (the defendant's) land should be presumed from the circumstances under which the same were presumably created and actually enjoyed; subject to the defendant's right to the use of the water for the purpose of irrigating his lands by proper and requisite channels and other proper means. *Singh v. Pattuk.* 91

WAYS.

See ARBITRATION, 133.

WILLS.

1. J. E. made a will in which he devised his house, lands, and tenements to his mother, "Elizabeth E., her heirs and assigns, forever;" he afterwards struck his pen through the words, "her heirs and assigns forever":

Held, that this was, under the 6th section of the Statute of Frauds (29 Car. 2, c. 3), a valid revocation, by obliteration, of a clause in his will; the mother took only an estate for life.

2. The 6th section of the statute was satisfied by this act of obliteration of the words in question, which amounted to an actual revocation, and not a mere alteration.

3. The word "clause" in the first portion of the section may properly be read "part."

4. *Per* LORD PENZANCE: "Devise" in the statute means a disposition of lands, in writing, and when the statute says the testator may revoke any "clause thereof," it means any intelligible portion of the devise, whether the effect is to increase the beneficial interest of the taker, or the reverse. *Swin-ton v. Bailey.* 48, 63 note.

5. A testator gave to R. K. £2,000 and to "each of his brothers £1,000," and bequeathed the residue of his estate between Sir T. K. and R. B. Sir T. K. was the eldest brother of R. K., who was the third among eight:

Held, reversing the decision of the court below, that Sir T. K. was entitled to the legacy of £1,000 as one of the brothers of R. K. in addition to half the residue.

6. In his holograph will, a testator wrote along the margin opposite to legacies to servants these words, "All free of legacy duty." There was no circumflex or mark to show where they were intended to be read:

Held, reversing the decision of the court below, that all the legacies given in the will, both those to relatives and those to servants, were free of legacy duty. *Kirkpatrick v. Bedford.* 69

7. A testator, who had four daughters, divided a fund into four equal amounts, giving one to each daughter and her children; but when one died and left no child the interest was to be paid to the others, and after the death of the last survivor the fund was to be divided among her children; "or if there be no such children, that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the statute for the distribution of intestates' estates." One of the daughters left issue, the others had no issue. On the death of the last daughter:

Held, that under the words of the will the class of "next of kin" described the persons who filled that character at the time of the death of the testator, and not at the death of the last surviving daughter; and that the

shares of the daughters who had died without issue were divisible among the persons representing the four daughters. *Mortimore v. Mortimore*. 829, 834 note.

8. A mutual will is by Roman-Dutch law in effect two wills, the disposition of each sharer being applicable to his or her half of the joint property.
9. Where A. and his wife C. (who survived him) by "mutual will" appointed their daughter, her husband, and her then existing child (the plaintiff), and also the other children "which may hereafter be procreated" by their daughter, to be the sole heirs of all the joint estate of A. and C. which should be left at the death of the first deceased of them, to be divided according to law amongst their daughter, her husband and her child, as also by the children which may be hereafter procreated by their daughter; and it appeared that no such children came into existence until after the death of A. and C.:
Held, that, on the due construction of the mutual will, A.'s intention was to divide his property (which he treated, movable and immovable, as one *corpus*) amongst the class of persons whom he had instituted his sole heirs, and that the distribution should take place when his will would become operative according to the ordinary rule of law. The words "which may be hereafter procreated" apply to children to be born between the date of his will and his death.
10. *Held*, further, that the daughter and her husband took, contrary to the English rule of construction, each a share, i.e., each a third of A.'s estate instead of a moiety thereof between them, Roman-Dutch law assuming husband and wife for most purposes to be two separate persons.
11. *Held*, further, that although the son-in-law took a third share of A.'s estate on A.'s death, yet as he died before C. his share of C.'s property lapsed into the residue, which on her death the daughter and the plaintiff were entitled to divide equally between them. *Dias v. De Livera*. 658, 671 *note*.
12. The rule in *Wild's Case*, even if only
 33 ENG. REP. 56
- a rule of construction, is not now to be departed from.
13. It is consistent with that case that the primary sense of the word "children" is issue of the first generation. That primary sense is displaced when circumstances render the rule in *Wild's Case* applicable, on which the word becomes a word of limitation and not of purchase.
14. A testator by a will made in 1823 gave "the whole of my landed property situate, &c., to my eldest son H. W. and to his children lawfully begotten. In case of his dying without issue male or female I give the same landed property to my second son C. In case of C. dying without children or child lawfully begotten, I give the same landed property to my daughter Harriet and to her child or children lawfully begotten; and, should she have no children, she shall have a power of bequeathing it to whomever she pleases. I do hereby give and leave a full discretionary power to each of my children arriving at the possession of this landed property, to dispose of it by their will and testament to one, or to each, of their children, in such manner and in such proportions as to each of them, my children, shall seem meet and right and proper. My reason for this is that as there is a title of baronet in the family the eldest son ought to possess something more than the others, and also that I never wished to encourage disobedient children, therefore I leave the power of punishing or rewarding, as each of them coming into possession of the property, and having children, shall think right."
 H. W. never had a child. C. died during the life of his elder brother, but left a daughter. H. W. after entering into possession, disentailed the estate, and devised it to his wife's nephew:
Held, that H. W., by virtue of the rule in *Wild's Case*, took an estate tail under the will; that the existence of the power did not affect the application of the rule, nor was it affected by the use of the word "children"—in one instance applicable to the sons and daughter of the testator, and in the other instance meaning their sons and daughters. *Clifford v. Kee*. 746
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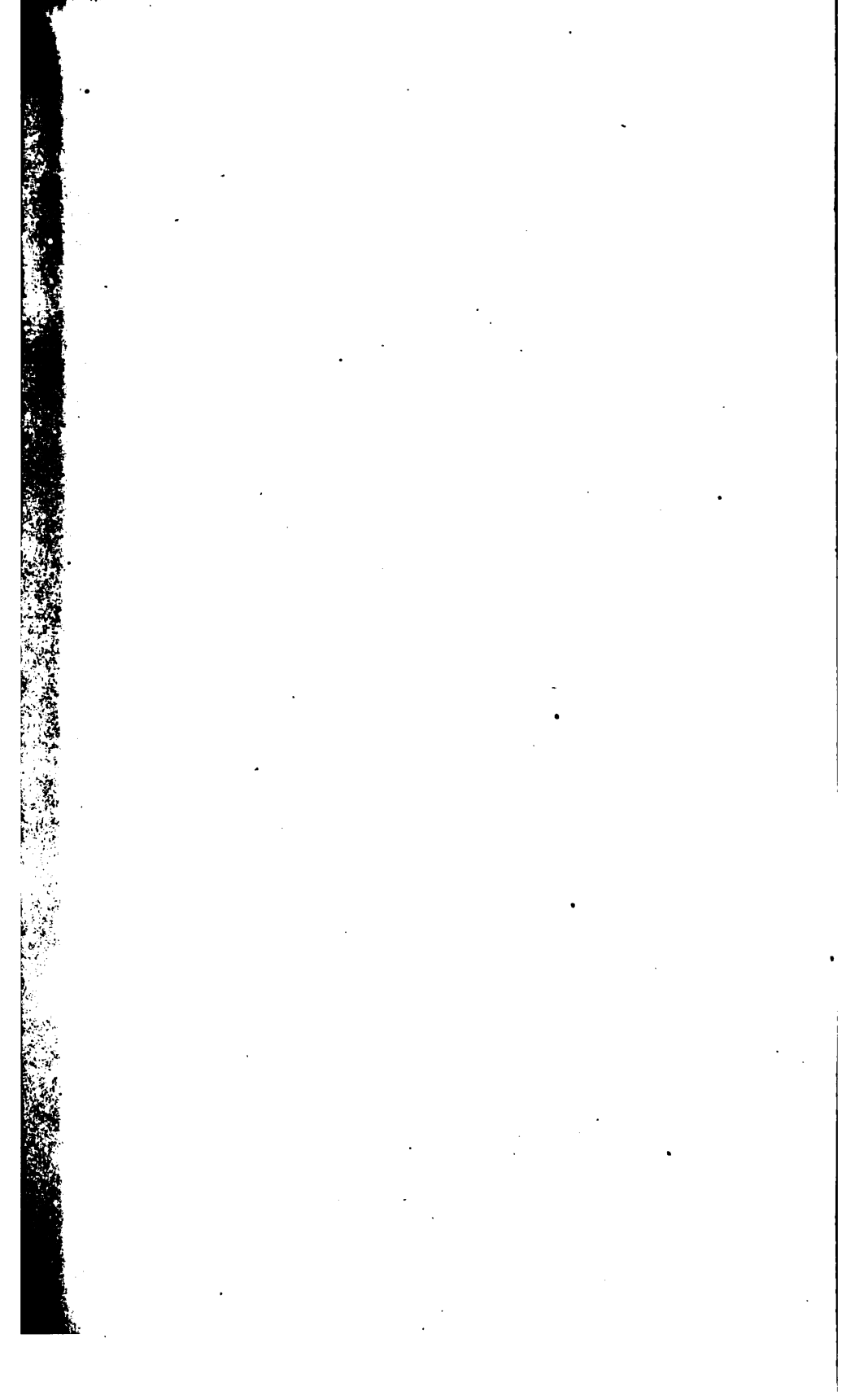
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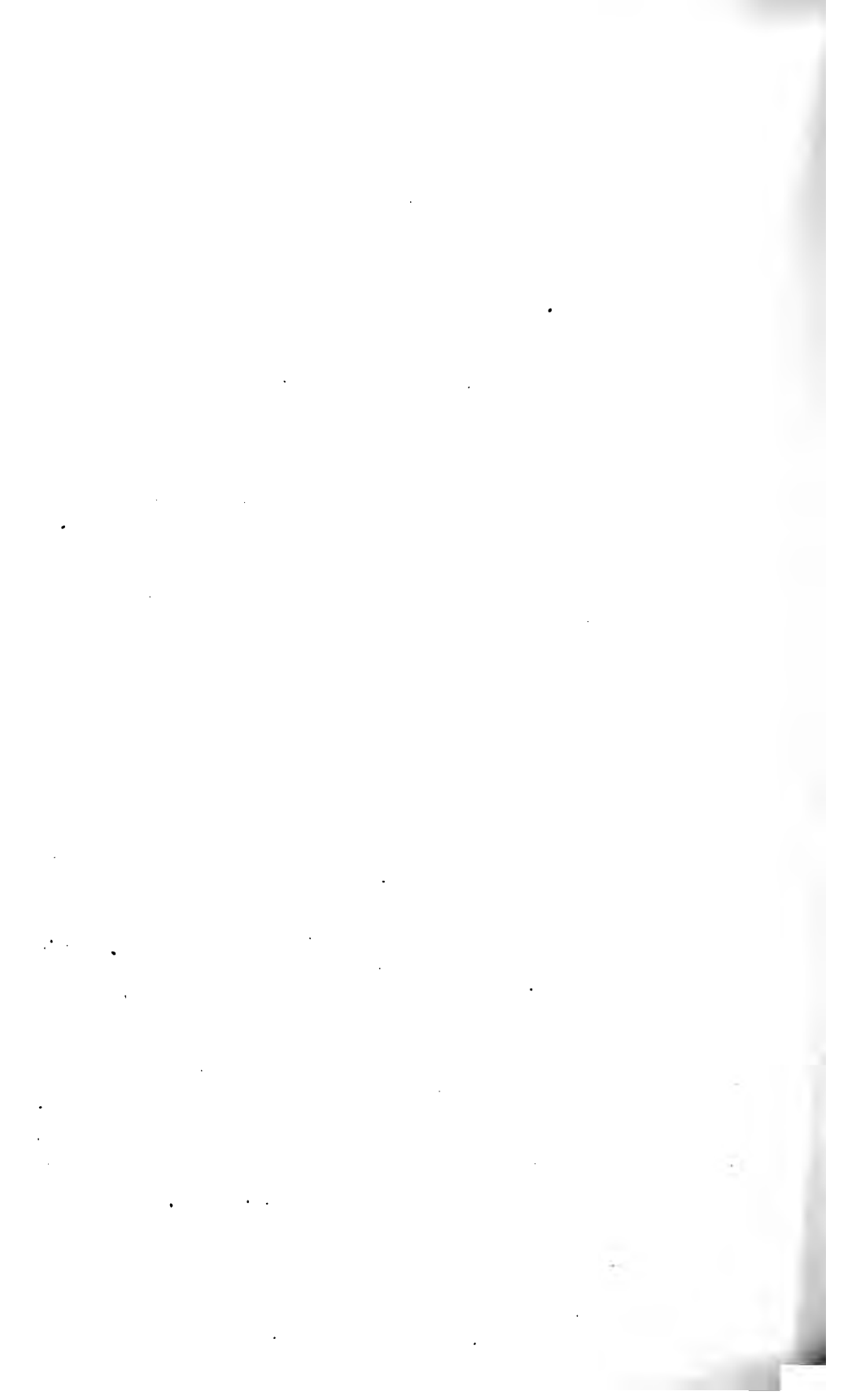
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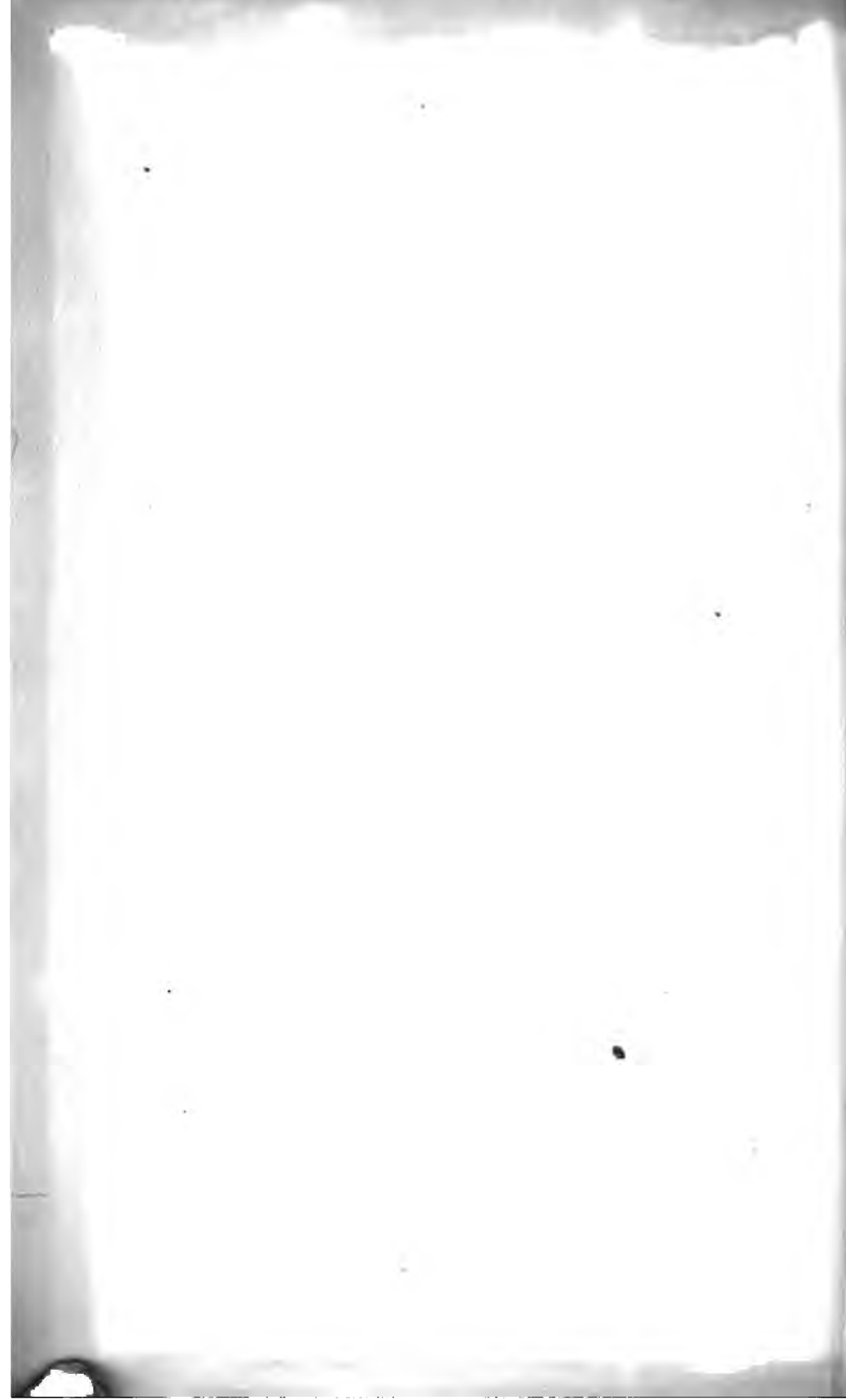
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